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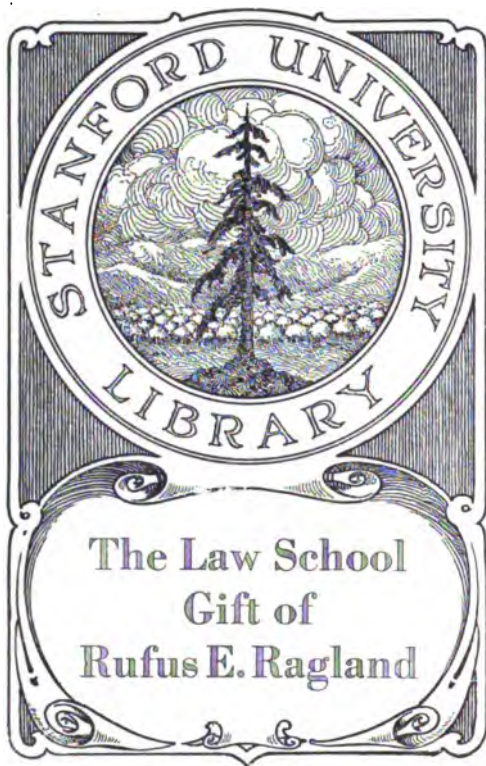
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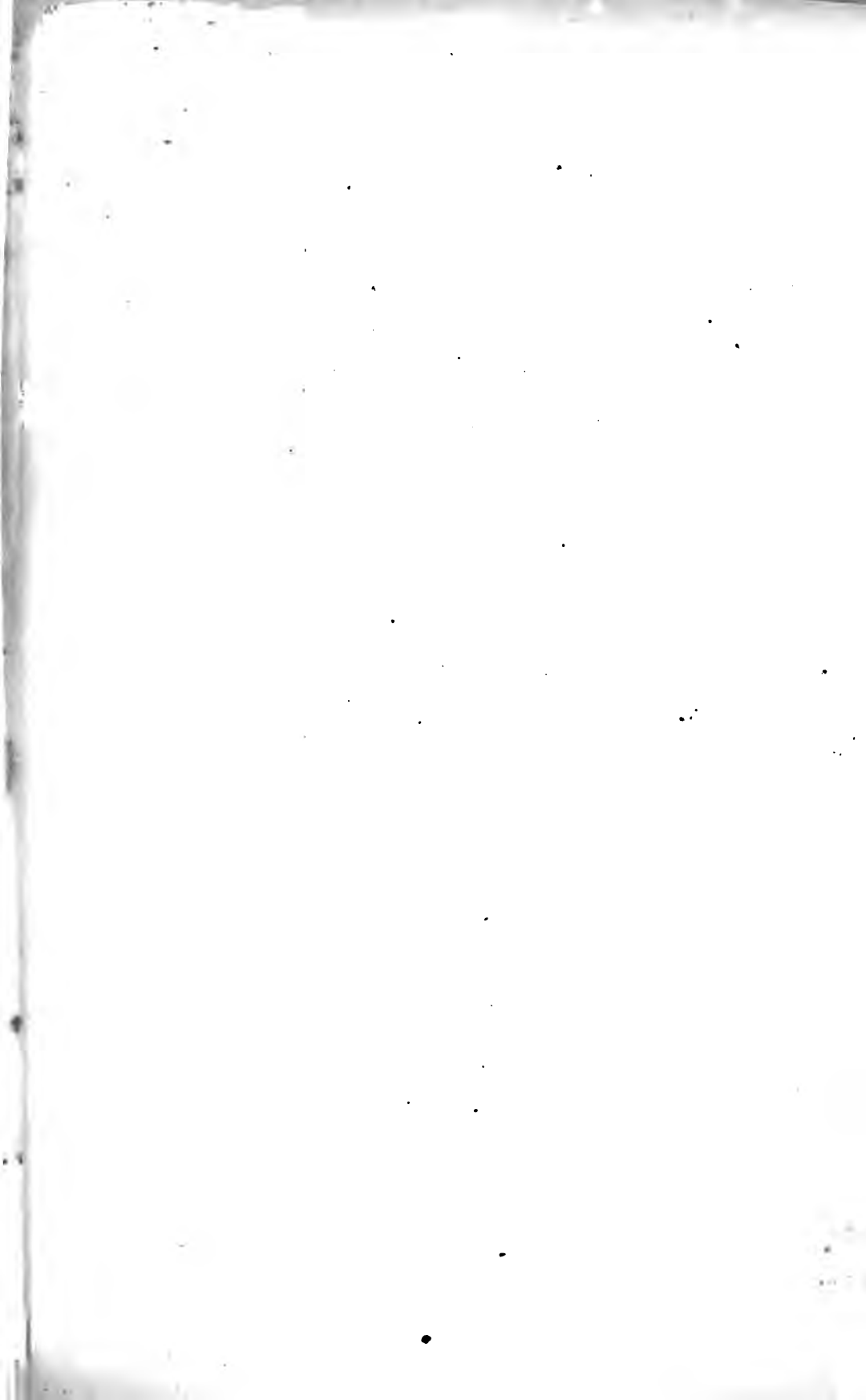
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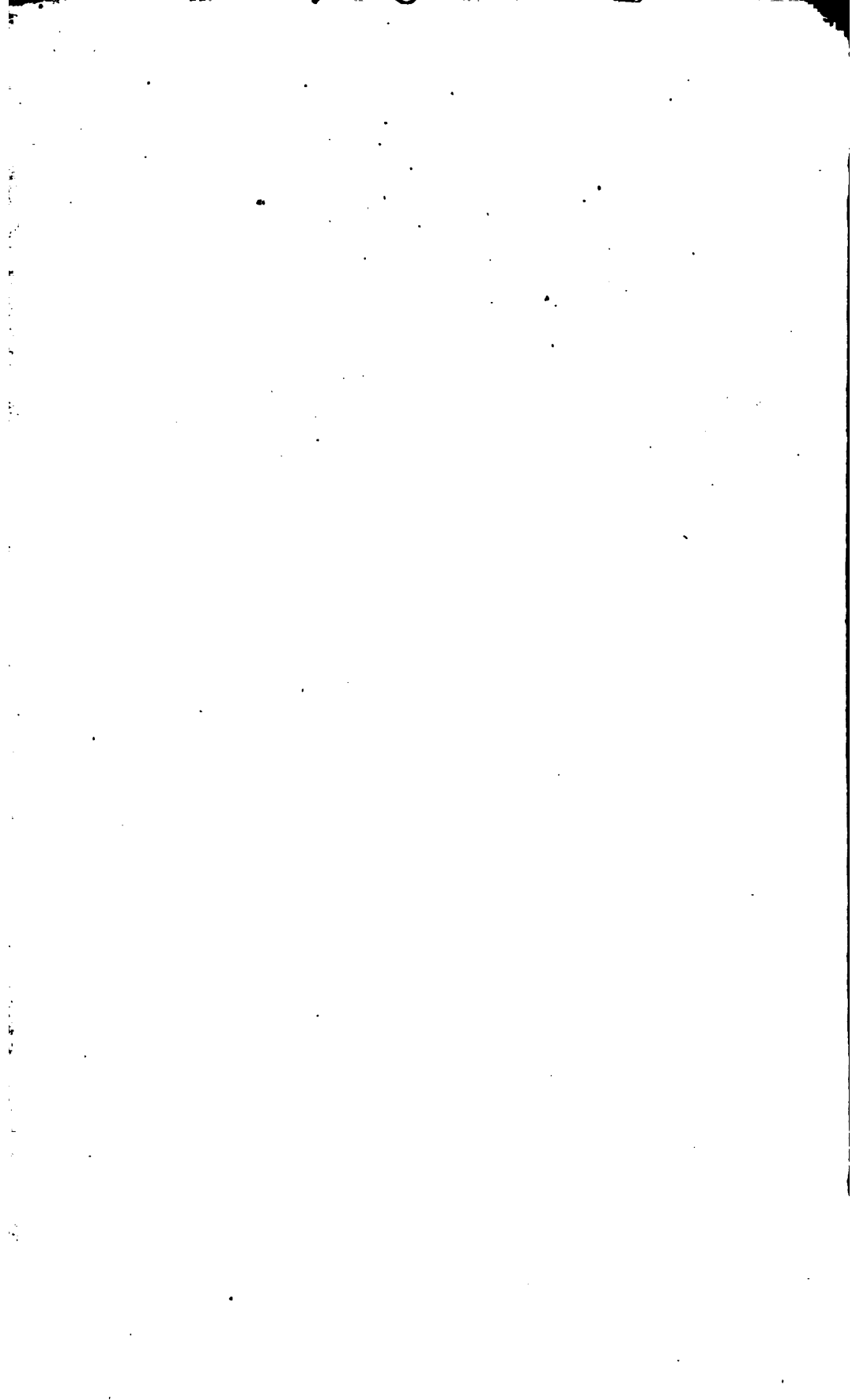
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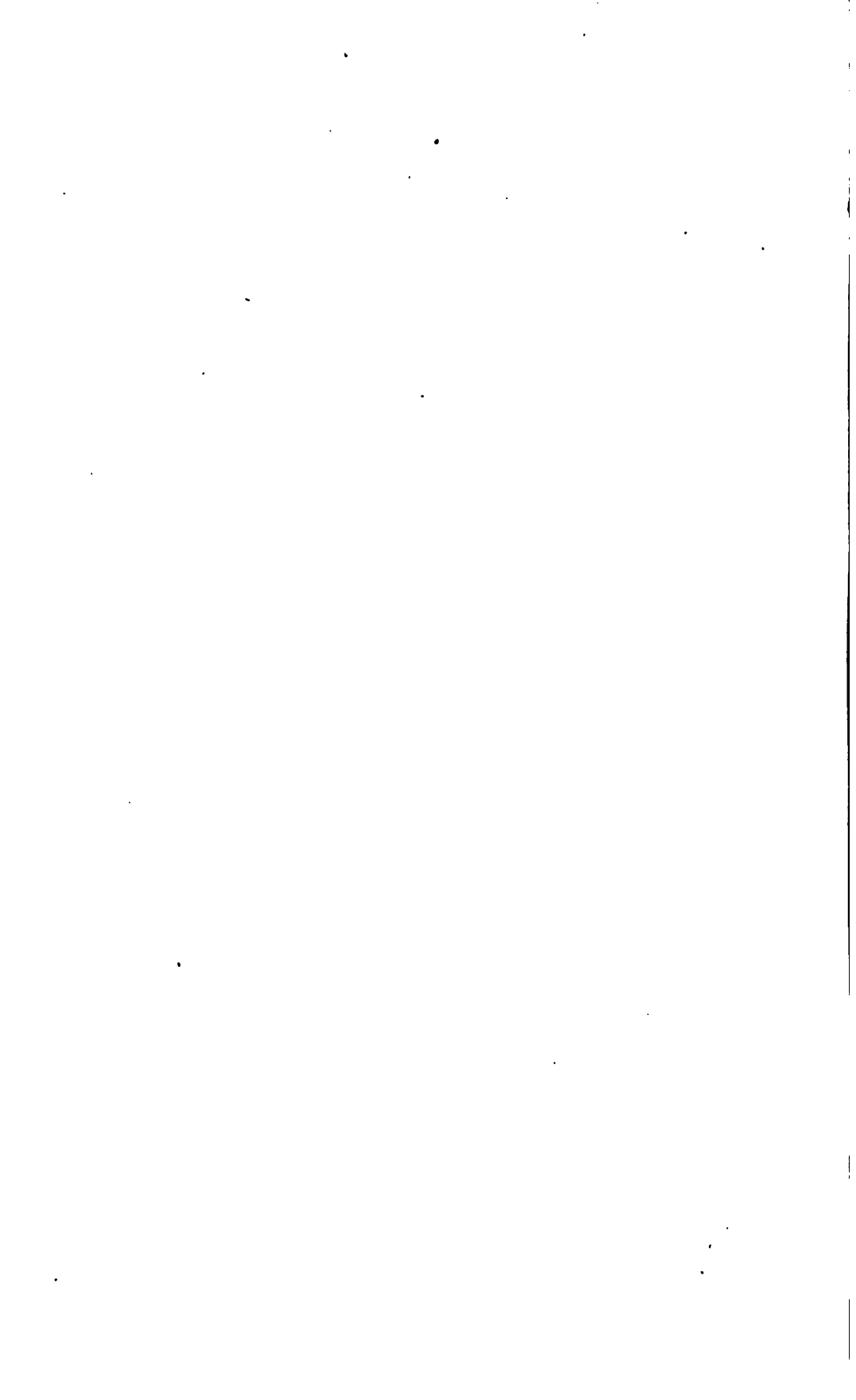
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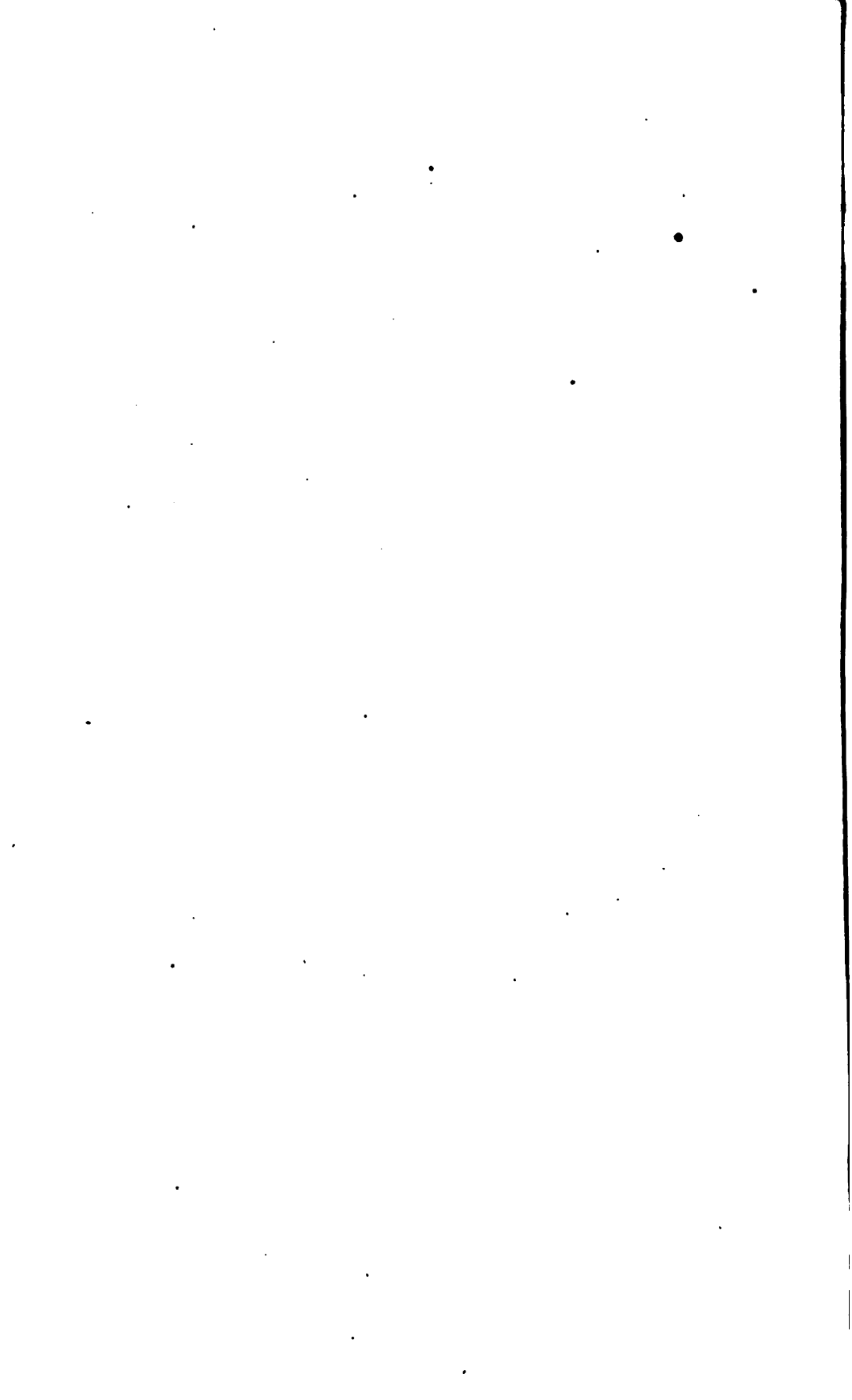


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# C A S E S.

ARGUED AND DETERMINED.

IN THE

## HOUSE OF LORDS;

DURING THE YEAR 1854.

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*In re* THE INDEPENDENT ASSURANCE COMPANY. R. H. TERREL *v.*  
JAMES HUTTON, official manager.<sup>1</sup>

March 16, 1854.

*Company — Winding-up Acts — Solicitor's Bill — Allowance as Claim  
or Debt.*

A company was completely registered. On a proceeding under the winding-up acts, the solicitor who had been employed in its formation carried in before the master his bill for the whole expenses incurred, both those preliminary to the registration of the company and those incurred subsequently to that period. The master only allowed the bill as a claim, and gave the solicitor liberty to proceed by action as he might be advised:—

*Held*, that this course was erroneous. That the winding-up acts embraced both equitable and legal claims; and that, as there was no doubt of the retainer and employment of the solicitor, the bill ought to have been allowed as a debt, but subject to taxation.

THIS was an appeal against an order of Vice-Chancellor Kindersley, directing payment of costs to the official manager, but declining to make any direction on the prayer of the appellant to remodel an order of Master Tinney on the matter of a proceeding under the Winding-up Act of 1848. The facts of the case are stated, 8 Eng. Rep. 64, but it is necessary here to add the 44th clause of the deed of settlement: "That a sufficient part of the funds of the company shall, upon the complete registration thereof, be appropriated in payment of the expenses of, and incidental to, the formation of the company, including those of or having reference to the preparation and execution of these presents, and such complete registration as aforesaid, and any deeds of supplement for the purpose." This clause did not

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<sup>1</sup> Present: the Lord Chancellor, (LORD CRANWORTH,) LORD BROUGHAM, and LORD ST. LEONARDS.

*In re The Independent Assurance Company. Terrel v. Hutton.*

appear to have been taken into consideration in the court below. The Vice-Chancellor, in substance, held that the members of a completely registered company were not liable for preliminary expenses unless they had expressly or impliedly rendered themselves liable; that the bill in this case was so framed that it was impossible to distinguish the preliminary from the subsequent expenses, and the master had, therefore, come to a right conclusion in allowing the whole bill as a claim only. The appeal was brought against this decision.

*Wilcock* and *Terrell*, for the appellant. The claim here ought to have been allowed as a debt, without the appellant being required to prove it in an action. The case depended entirely on the retainer of the company, and as to that retainer having been given, there could be no doubt. There were several resolutions with relation to the appointment. There was clearly a contract between the parties. *Ex parte Cope, in re The Independent Insurance Company*, 1 Sim. N. R. 54, s. c. 1 Eng. Rep. 87, before Vice-Chancellor Rolfe, was conclusive. There, the claimant had signed the agreement that no director should be personally responsible; but when he came to ask, not only for a salary for bygone times, but for payment for the time of the year's notice, the Vice-Chancellor said, 1 Eng. Rep. 90: "I have no doubt the meaning of the resolution that they were not personally liable was, that he was not to sue A or B, and say, you are the person that employed me. He says, all I look to is the funds of the company when the company is formed." Here the directors, though not liable in their personal capacity, were liable in respect of the funds of the company. *Lloyd's case*, 1 Sim. N. S. 248, s. c. 3 Eng. Rep. 279, was to the same effect. The only question was as to the amount; and being so, the appellant ought not to have been called on to establish the legal validity of his claim. *Norwich Yarn Company*, 21 Law J. Rep. (N. S.) Chanc. 822; s. c. 13 Eng. Rep. 194. Then, if so, there were the means of payment; for the company must be taken to have capital so long as there were calls not paid up.

*The Solicitor-General*, (Sir R. Bethell,) and *Roxborough*, for the respondent. The Winding-up Act was passed to determine claims as among the persons composing the company, but the rights of creditors were to remain as before. That was the clear intention of the 58th section. The legislature seemed to have thought it desirable that the creditor should come in to register his claim before proceeding at law. That was the purport of the 73d section of the Winding-up Act. The 75th section merely gave the official manager power to allow or disallow on the parties appearing before him and choosing to resist or to admit the debt. In the latter case alone, he might admit it as a debt. The language of the present Lord Chancellor, in *The Norwich Yarn Company's case*, 13 Eng. Rep. 195 n., is in point here: "What takes place in the master's office has nothing to do with the action that is pending. When that act of parliament first passed, a great number of applications were made to be at liberty to prove, but the court refused to interfere. . . . It is useful that the master

should know the extent of the claims, that he may be regulated in making a call; but it is not intended otherwise to interfere with the creditor."

[The LORD CHANCELLOR. There is a mistake of a word there, in the phrase "to be at liberty to prove." I must have said, "to be at liberty to proceed."]

It was quite clear that the 58th section did not mean that the master should be substituted for a jury. To decide this case for the appeal, would be to effect the substitution thus prohibited. No such course could be pursued, except where the claim was so complicated that a jury would be an unfit tribunal to decide it. That was not the case here. In no respect could this case be assimilated to an administration of assets in chancery. The question of liability was contested here, and that could only be determined by a jury. Even if the 44th clause in the deed could be so construed as to give the appellant a right to payment of expenses incurred before the company was formed, it was clear that any subsequent claim was one of mere legal liability, which was to be contested at law. The master here had done as much as he was entitled to do; he had gone into the question so far as to satisfy his mind that there was a real question to be tried, and then, not having the power to adjudicate that question, he gave the appellant leave to proceed at law.

*Wilcock*, in reply. In answer to a question from the House, he said, that the appellant was willing to submit to any taxation, to see whether the expenses he claimed were those which could properly be said to come within the meaning of expenses incurred in the formation of the company.

The LORD CHANCELLOR, (LORD CRANWORTH.) Then there is no difficulty in the case. The appellant had acted as a solicitor in the formation of the company, and after the company had been formed, sent in his bill, properly so called. That bill included all his demands, in respect of work and labor in forming the company, and after it had been completely formed. The master disallowed this as a debt, but allowed it as a claim, leaving the appellant to establish his claim at law. By some singular omission, the most important article in the deed, the 44th article, was not brought to the master's notice, and the question is, whether the order he made is right. The House goes with the respondent in this, that the company ought not to be bound by the details in the bill. But, provided it was established as a conclusion of fact that the bill was made up of items after the formation of the company, or of expenses which were incident to the formation of the company, we think the Vice-Chancellor was wrong in not allowing the bill as a debt. I do not recede from one word which is attributed to me in the case of *The Norwich Yarn Company*, and my opinions there are, with the slight exception I have noticed, correctly reported. The Winding-up Act was made for the purpose of enabling such of these companies as could not be prosecuted with advantage, to be wound up; and, in order to be so, the legislature put them in a situ-

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*In re The Independent Assurance Company. Terrel v. Hutton.*

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ation nearly the same as individuals in an ordinary partnership — they were to have accounts taken, and settlements made, as well as the nature of the case permitted. The legislature made a great number of special provisions for this purpose. In winding up the affairs of the company, one of the material things to be ascertained is, what debts are due and owing by the company; the next thing is, to find what the members are respectively to contribute in order to discharge those debts. With that view, it is by the 73d and some other sections provided, that persons should not commence, or if they had commenced, should not proceed with actions at law to recover debts without first coming in and proving before the master, so that the master might know the amount of the debts; and then the master is to have power to direct the winding up, having regard to the debts proved. There was no intention on the part of the legislature in the Winding-up Act to give the creditors any larger rights than before, or to take from them any rights which they before possessed to enforce payment of debts. Then the question is, whether this is a demand which ought to be admitted as a debt under the act, subject to having its amount ascertained. Lord Cottenham often said that companies cannot take advantage of being formed without taking the liability which follows on their formation. Here the solicitor seems to have done that, without the doing of which the company could never have existed. It is a principle of law, that if a man acting as an agent for another person does something which that other person adopts, he becomes liable in respect of it in the same way as if he had authorized it from the beginning. Coupling that principle with the 44th article of the deed, your lordships are enabled to arrive at the conclusion, that what was done for the formation of the company, or in prosecution of the necessary business of the company, is something in respect of which he who did it is entitled to be considered a creditor of the company. If so, then the only other question is, what is properly the amount of the debt? That the appellant has acted as a solicitor for the company which was to become a company cannot be disputed. I think that we ought to allow this appeal so far as it disputes this order, and to refer the case back to the Court of Chancery, with a direction that the appellant ought to be admitted as a creditor for the amount of all done by him since the formation of the company, and for all the expenses which were necessarily incurred by him in the formation of the company, and also with directions to the proper officer to tax the amount.

LORD BROUGHAM concurred.

LORD ST. LEONARDS. This is a matter which is not open to any doubt. It is a matter of necessity that a solicitor should be employed before a company is formed, for there must be a great deal of preliminary matter which it requires a solicitor to perform, and, therefore, the Joint-Stock Companies Acts provide for the appointment of a solicitor, and particular duties are assigned him. The interpretation clause of the Winding-up Act says, that "the word 'creditor' shall

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Scott v. Scott.

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include every person having any debt or demand enforceable against any company in any court of law or equity, or for non-payment or non-satisfaction of which damages could be recovered." So that the Winding-up Act provides for equitable as well as legal debts. Then, by the 58th section, it is provided, that nothing "in that act shall extend to enlarge, diminish, prejudice or in anywise alter or affect the rights or remedies of creditors not being contributories of the company." Here is a creditor who does not insist on bringing an action, but the company insist that he shall do so. What the creditor is to do is provided for by other sections, and this appellant has done all that the act requires. There is no answer to be given to the 75th section, by which the master is "to allow or disallow, or to allow as claims only," which shows that he may allow them as debts. Here the Vice-Chancellor does not appear to have been made aware of the 44th clause of the deed. That clause puts this company out of court. The master has to ascertain not only legal but equitable debts due by the company. This debt was one of the latter sort, and ought to have been allowed as such. The 44th clause of the deed was not brought to the notice of the Vice-Chancellor; he did not, therefore, fully carry into effect the provisions of the act of parliament. The case must be remitted, with a variation.

*Ordered, accordingly.*

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SCOTT v. SCOTT.<sup>1</sup>

March 8, 1854.

*Conveyancing — Statute of Limitations — Adverse Possession — Equity.*

A being the owner in fee of estate K. and other estates in Ireland, subject to a mortgage in fee, by a deed of February, 1807, which upon the face of it was for valuable consideration, purported to convey these estates to trustees in fee, upon trust for himself for life, remainder to his eldest son B. (then unmarried,) for life, remainder to B's first and other sons in tail male, &c. In June, 1807, A and B by deed, which on the face of it did not appear to be for value, purported to convey estate K. to trustees in fee, upon trust for A for life, remainder to W. a younger son of A, for life, remainder to W's first and other sons in tail male, thereby, in effect, treating the previous deed as cancelled. A died in 1808, when W. entered into possession of estate K, and either he or the appellant, J., his eldest son, had remained in possession ever since. In 1811, the mortgage was paid off by B., and the legal fee in estate K. was conveyed to him. In 1815, W. married, upon which occasion estate K. was made the subject of settlement. In 1837, B. died, leaving the respondent, J. B., his eldest son, his heir at law and in tail. In 1844, J. B. claimed estate K. under the deed of February, 1807, and brought his ejectment against J., but failed, the judge who tried the case being of opinion, and so directing the jury, that the plaintiff was barred by the Statute of Limitations and the twenty years' possession of the defendant.

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<sup>1</sup> Before the Lord Chancellor, (LORD CRANWORTH,) LORD BROUGHAM, and LORD ST. LEONARDS. Appeal from the Court of Chancery in Ireland.

*Scott v. Scott.*

J. B. then brought his suit in equity to obtain possession of estate K., and that the reconveyance of the legal fee in 1811, might be declared to have been obtained by B. as a trustee for the parties claiming under the deed of February, 1807:—

*Held*, (agreeing with the court below that the deed of February, 1807, should be treated as a deed for value, and that of June, 1807, as not for value,) that the fee acquired under the Statute of Limitations did not create any bar in this case, for that the possession of W. and his son was to be treated exactly in the same way as if he had obtained the legal fee by conveyance, in which case the trusts of the deed of February, 1807, would have attached.

JOHN Scott, of Cahircon, in the county of Clare, the grandfather of both the appellant, John Scott, and the respondent, John Bindon Scott, was, by inheritance, entitled to large landed estates, in the counties of Clare, Tipperary, and Kerry, and upon his marriage, in 1763, with Miss Jane Bindon, these estates were settled upon himself for life, remainder to his first and other sons in tail. Subsequently he acquired other lands, in the county of Clare, called Masnery Lane, Crevagh, Carrowgare, Knocknaguage, and Knoppogue. By an indenture of mortgage, dated the 18th March, 1806, he conveyed these last-named lands in fee to the Right Rev. John Law, Lord Bishop of Elphin, to secure the repayment of 5,000*l.* and interest. By an indenture, dated the 28th February, 1807, and made between the said John Scott, of the one part, Bindon Scott, the eldest son of the said John Scott, of the second part, and John Percy and Samuel Spaight, of the third part, after reciting the said marriage settlement, whereby the settled estates were charged with a sum of 5,000*l.* for younger children; and that the said John Scott had lately, as his free gift, conveyed certain estates, of the yearly value of 800*l.* and upwards, to or in trust for his second son, John Scott, and certain other estates, of the yearly value of 300*l.* and upwards, to his youngest son, William Scott; and that, upon the marriage of his daughter, Diana, with Boyle Vandeleur, he had paid him the sum of 3,000*l.* as and for her marriage portion; which said provisions the said John Scott declared to be in lieu of his said children's distributive shares of the said sum of 5,000*l.*; and after reciting that the said John Scott, the elder, had lately acquired the several estates above mentioned, including the said estate of Knoppogue, and that the said John Scott was also possessed of a personal estate or fortune to a large amount, consisting of moneys due upon mortgage, judgments, and other securities, which said several last-mentioned lands, and all other the real, freehold, and personal estate of the said John Scott, of which he was then seised, and over which he had then dominion, he was minded to convey to and settle upon his said eldest son, Bindon, for the considerations and to the uses, intents, and purposes thereafter mentioned—that was to say, to the intent that the said Bindon should in the first instance, and with all convenient speed, pay off and discharge all just debts due by the said John Scott, the elder, then subsisting, and to the payment whereof he, the said John Scott, was personally liable, whether the same be immediately payable or not, and so that the said John Scott, or the growing income of his estates, during the time of his natural life, should not thenceforth be molested, inconvenienced, lessened, or affected thereby, &c.; and to the intent that the said sev-

eral acquired estates should be conveyed to trustees to the use of the said John Scott, the elder, for the term of his natural life, and after his decease, to the use of the said Bindon Scott for life, remainder to his first and other sons in tail: it was witnessed, that the said John Scott, in consideration of the natural love and affection which he bore to the said Bindon Scott, and also in consideration of the covenants and agreements, on the part of the said Bindon Scott, to be kept, done, and performed, granted, &c., (all the said acquired estates above referred to,) unto the said John Percy and Samuel Spaight, and their heirs and the heirs of the survivor, to hold the same, and all equity of redemption, claim, and demand of him, the said John Scott, in and to the same, unto the said John Percy and Samuel Spaight, their heirs and assigns, to the use of the said John Scott, the elder, and his assigns, for the term of his natural life; remainder to the use of the said Bindon Scott and his assigns, during the term of his natural life; remainder to the same trustees to preserve contingent remainders; remainder to the use of the first, second, third, fourth, and every other son and sons of the body of the said Bindon Scott, lawfully begotten, in tail male.

And, by the same indenture, John Scott assigned to the said Bindon Scott all his mortgages and securities for money; and the said Bindon Scott, in consideration of the said release and assignment, did, for himself, his heirs, executors, administrators, and assigns, covenant with the said John Scott, his heirs, executors, and administrators, that he, the said Bindon Scott, his heirs, executors, or administrators, should or would pay, or cause to be paid, all and every the just debts, of every kind or nature whatever, in which the said John Scott then stood or was indebted, whether the same were payable then or at a future time, &c. This deed was not registered until the 1st June, 1807. About the end of May or beginning of June, 1807, family arrangements were entered into, whereby it was agreed between the said John and Bindon, that the said lands of Knoppogue should be settled upon William Scott, the youngest son of the said John Scott, in strict settlement; and in the instructions to counsel to prepare a deed accordingly, after referring to the deed of the 28th February, 1807, it was stated as follows: "But, as it is not found suitable to cancel the deed made to the said Bindon, which has many other objects distinct from a settlement of the said lands of Knoppogue, it is submitted to counsel that the deed of conveyance to the said William Scott can be given full effect to by the said John and Bindon joining in the conveyance to him of the said lands." Counsel, Mr. Charles Burton, (afterwards Burton, J.,) upon preparing the draft-deed, wrote as follows: "I have read the deed of the 14th February, 1807, and the copy of the deed of the 28th February, 1807, the limitations of which latter deed make the proposed arrangement a matter of some awkwardness; for it is impossible, while that deed remains, for Mr. Bindon Scott to do any thing more than convey a life interest. If, therefore, the parties choose to have the proposed arrangement take place by way of settlement, it appears to me that the only practicable mode is to cancel both the deeds of the 14th and 28th February, 1807,

(neither of which, as I understand, has been registered,) and to execute two new deeds," &c.

This opinion was dated the 4th June, 1807. Two deeds were prepared and executed — one, dated the 12th June, 1807, between the said John Scott, of the first part, the said Bindon Scott, of the second part, the said William Scott, of the third part, and the trustees of the fourth part, which was as near as possible to the same effect as the said deed of the 28th February, 1807, except that the lands of Knoppogue were not conveyed to Bindon Scott, and his first and other sons in tail, but all the other estates comprised in the deed of the 28th February, 1807, were; and it contained a similar covenant, on the part of the said Bindon Scott, to pay the debts, &c., of the said John Scott. The other deed was dated the following day, the 13th June, 1807, and made between the said John Scott, of the first part, the said Bindon Scott, of the second part, the said William Scott, of the third part, and trustees, of the fourth part, whereby the said John Scott, in consideration of the natural love and affection which he bore to his said son, William Scott, granted and conveyed, and the said Bindon Scott ratified and confirmed, the said lands of Knoppogue to the trustees, parties thereto of the fourth part, to the use of the said John Scott for life, remainder to William Scott for life, remainder to trustees to preserve, remainder to the first, second, and other sons of the said William Scott, lawfully to be begotten, severally and successively, in tail male, &c.; and this deed contained a release from the said William Scott to the said John Scott, his father, and a declaration that the conveyance of the said lands of Knoppogue was intended to be in full satisfaction and discharge of all claims and demands which he, the said William Scott, had or might have against the said John Scott, or against his real or personal estate, by virtue of any settlement, or otherwise howsoever.

John Scott, the father, died in 1808, whereupon William Scott entered into possession of the lands of Knoppogue as tenant for life, under the last-mentioned deed. In 1811, the heir and executor of the said Bishop of Elphin, who, it will be remembered, was legal mortgagee in fee, reconveyed the lands of Knoppogue to the said Bindon Scott, as the heir of the said John Scott. William Scott intermarried with Jane Jackson in the year 1815, and upon that occasion articles were prepared, reciting the deed of the 13th June, 1807, and it was thereby agreed that William Scott would execute his power of jointuring therein contained, and would also confirm that deed as to the limitations to the issue of William Scott. There were several children of that marriage, of whom the appellant, John Scott, the younger, was the eldest son. In the year 1810, Bindon Scott intermarried with Frances Percy, and the respondent, John Bindon Scott, born in the year 1811, was the only son of that marriage. Bindon Scott died in February, 1837, leaving the said John Bindon Scott, the respondent his heir at law and in tail. In the year 1844, John Bindon Scott, for the first time, asserted his right to the lands of Knoppogue, claiming under the deed of February, 1807, and brought his ejectment. The ejectment was tried at the Summer Assizes of the year 1844, for the

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Scott v. Scott.

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county of Clare, and at the trial, the judge directed the jury to find for the defendant, on the ground that the legal estate in the lands being at the time of the execution of the deed of the 28th February, 1807, in the mortgagee, and the lands having been reconveyed in fee to Bindon Scott in 1811, a court of law could take no notice of the trust, and that, therefore, the right of the plaintiff to recover, which could only be at law, as the heir of Bindon Scott, was barred at law by the Statute of Limitations, and the twenty years' possession of those from whom the defendant derived.

The jury, accordingly, found a verdict for the defendant, and a motion to set aside that verdict was refused by the Court of Queen's Bench. The respondent then filed his bill in the Court of Chancery in Ireland against the appellant and others, and prayed the declaration that the trusts of the deed of February, 1807, so far as related to the lands of Knoppogue, might be carried into execution, and that he might be declared entitled to the possession and enjoyment of the same, and that the reconveyance of 1811 might be declared to have been obtained by the said Bindon Scott, as a trustee, on behalf of the several persons claiming any estate or interest in the said lands, or the equity of redemption therein, under the deed of 28th February, 1807; or that the defendant might be decreed to admit, at the trial of any ejectment to be brought by the plaintiff for recovery of the said lands, that the said John Scott was seised in fee thereof at the time of the execution of the deed of the 28th February, 1807, and that the plaintiff was entitled to an account of the rents and profits for six years back.

The cause coming on to be heard, the Lord Chancellor of Ireland, by his order dated the 28th June, 1848, directed that the plaintiff, should be at liberty to proceed by ejectment for recovery of the lands of Knoppogue, and that the defendant, John Scott, and all other the persons taking defence thereto, do waive all temporary bars. The respondent then brought a second ejectment, which was tried in the year 1849, and at the close of the case the judge left it to the jury to say, first, whether upon the evidence the deed of the 28th February, 1807, was voluntary or not; and, secondly, whether the deed of the 13th June, 1807, was voluntary or for valuable consideration; and the jury found that the first deed was voluntary, and the second deed for valuable consideration; and upon these findings the judge directed a verdict for the appellant. The plaintiff then moved the Court of Queen's Bench to set aside that verdict, and for a new trial, both of which the court granted. The ejectment was taken down for trial at the Spring Assizes for 1850, but the defendant did not appear, and ultimately judgment was entered for the plaintiff in the ejectment. The cause was set down before the Lord Chancellor on further directions in Michaelmas term, 1850, when his lordship, by his decree of the 11th December, 1850, ordered that the defendant, John Scott, should deliver up possession of the lands of Knoppogue to the plaintiff, and that he should account for the rents and profits from the 27th May, 1839, &c. John Scott now appealed both from this latter order and the order of the 28th June, 1848.

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Scott v. Scott.

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*Butt* and *Rolt*, (*Schwyn* was with them,) for the appellant, contended—First, that the deed of the 28th February, 1807, must be considered to have been, *qua* the future issue of *Bindon Scott*, as much a voluntary deed as if the limitations after his life estate had been to a total stranger; citing *Colyear v. The Countess of Mulgrave*, 2 Kee. 81; *Sutton v. Lord Chetwynd*, 3 Mer. 249; and *Davenport v. Bishop*, 2 Y. & C. C. C. 451. Secondly, that if the deed of the 13th June 1807, was not originally for valuable consideration, yet that as it was afterwards treated as a valid deed upon the occasion of the marriage of *William Scott* in 1815, it acquired the character of a deed for valuable consideration; citing *Brown v. Carter*, 5 Ves. 862; 3 Sugd. V. & P. 297–8, 10th ed.; last ed. 937, pl. 40.

*Fitzgerald*, Q. C. and *Fleming*, for respondent. *Heape v. Tonge*, 9 Hare, 90; s. c. 7 Eng. Rep. 189; *Roe d. Hamerton v. Mitten*, 2 Wils. 356; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Persse v. Persse*, 7 Cl. & Fin. 279; *Doe d. Baverstock v. Rolfe*, 8 A. & E. 650; *Eyre v. Dolphin*, 2 Ball & B. 290; *Forbes v. Denison*, 4 Bro. P. C. 189; *Keke-wich v. Manning*, 1 De G. M. & G. 201; s. c. 12 Eng. Rep. 134.

*Butt* replied.

THE LORD CHANCELLOR. My lords, this is a case which comes before your lordships upon an appeal from two decrees of the court of Chancery in Ireland—one a decree of 1848, whereby the court, being called upon to adjudicate, left it to the present respondent, if he thought fit, to bring an ejectment. The case will be more intelligible if I go through the facts in order. The first matter which it is necessary to refer to is that which is the foundation of all these proceedings, namely, a deed of settlement executed upon the 28th February, 1807, whereby *Mr. Scott*, one of the owners of certain estates, amongst others, of an estate called “*Knoppogue*,” being, or affecting to be, the owner in fee of that estate, conveyed that, with a great number of other estates, for the use of himself for life, remainder to the use of *Bindon Scott* for his life, with remainder to his first and other sons in tail. That deed is the foundation of the present dispute. *Mr. Scott* had several other children, amongst them a son *William*, for whom he had made a provision by some bonds, besides settling upon him an estate called “*Cragmoher*.” It may be proper to state, that on the 13th June, 1807, *Mr. Scott* and *Bindon Scott*, who had been successively made tenants for life of *Knoppogue*, conveyed *Knoppogue* to *William Scott*, another son of *John Scott*, with remainder to his first and other sons in tail. *Mr. Scott*, the father, the original settlor, died in the year 1808, a year or a year and a half after the execution of these deeds, and upon that *William Scott* entered upon the lands of *Knoppogue*, he being entitled both under *John Scott* and *Bindon Scott* to that estate for the term of his life. *Bindon Scott*, the eldest son, was largely provided for by other property, and lived till 1837, never having been in possession of *Knoppogue*, which had all along been in the possession of the younger brother, *William*. *William* lived after *Bindon* several years. He died in the year 1843,

leaving the present appellant, John Scott, his eldest son. In 1844, John Bindon Scott, the eldest son of Bindon Scott, who would be the party entitled under the deed of the 28th February, 1807, claiming to be entitled, brought an ejectment against John Scott, the eldest son of William Scott.

I ought to have stated, that at the time of the settlement in 1807, John Scott, the father, thought he conveyed as if he was the owner in fee, was not strictly so; he had not the legal fee, for it was outstanding in Dr. Law, the then Bishop of Elphin, as legal mortgagee in fee to secure 5,000*l.* and interest. It appears that in the year 1811, after the execution of both of these deeds, and after the death of John Scott, Bindon Scott, the eldest son of John, paid off the mortgage; at all events, the mortgage was paid, and the probable inference is, that it was paid by him, which would be conformable to the covenant he had entered into to pay his father's debts. Upon the occasion of the mortgage being paid off, the mortgage property of Knoppogue was conveyed to Bindon Scott in fee, and there can be no doubt, when Bindon Scott took that conveyance, he took subject to the trusts of the deeds of February and June, 1807, whatever was the fair construction of those deeds. Under the first deed he became the trustee of Knoppogue for himself for life, afterwards for his first and other sons; but he had conveyed away his own life interest by deed to his brother, William Scott. I have stated that, in 1844, John Bindon Scott brought an ejectment claiming that under the deed of February, 1807, he, upon the death of his father, Bindon Scott, in 1837, became entitled to this property; but he failed in his ejectment, and he failed for a reason that seemed to me rather staggering when first it was explained. I confess, in truth, that I do not feel quite satisfied that I go along with it. It would seem that he failed because he had too much estate, not because he had too little—because Bindon Scott being the person to whom this legal fee was conveyed, and therefore from whom it would have descended upon his son, it is said, that during all the life of William Scott, Bindon Scott was the owner of the legal fee, possession never having accompanied it, and that William Scott must be considered by the Statute of Limitations to have obtained a good title to the fee against him. That decision has not been quarrelled with, and it is very proper to assume it to be correct.

The result is, therefore, that Bindon Scott was displaced of his estate by virtue of the Statute of Limitations, by the possession of his brother William, and consequently John Bindon Scott, his son and heir, could not recover in that ejectment. Failing in the ejectment, John Bindon Scott was driven to seek relief in equity. His equity was this: Under the deed of February, 1807, he was the equitable owner of the estate in tail; his father was the equitable owner for his life, remainder to his first and other sons in tail. He, as his father's eldest son, was the equitable owner, because the legal fee was outstanding, first to the mortgagee, and afterward to those who claimed under the mortgagee; therefore he came to a court of equity, to desire to have relief given in equity; that any persons who had the legal fee, whoever they might be, might be ordered to convey to him;

and that he might be put into possession. Now, in answer to that claim, William Scott, or rather William Scott's son, John Scott, set up this defence. He said that the deed of February, 1807, was a voluntary deed; and after that deed was executed, the parties to it, for valuable consideration, made a settlement of Knoppogue upon William Scott for his life, remainder to his first and other sons. That was a deed for valuable consideration, which terminated the original deed, and displaced the interest of all those who were entitled under the original deed of the 28th February, 1807. That defence being set up, the question came to be argued before the Court of Chancery in Ireland in the year 1840, and this observation was upon the surface. Whether this be a valid defence or not is purely a legal question, except so far as relates to the bar created by the outstanding legal fee; therefore, said the court, let this be put in a proper train of inquiry, and let the appellant, (the present respondent,) who is seeking relief in equity, namely, John Bindon Scott, bring his ejectment, and let the temporary bar, as it is called, be put out of the way; let it be treated just upon the same footing as if John Scott, the original settlor, had been seised of the legal fee at the time he made the settlement, instead of the equitable fee.

Now, some little cavil has been made as to the form of this decree. It is said that the restraint of setting up the temporary bars was confined to the defendant in the ejectment—that is to say, was confined to the children of William Scott only; whereas it ought to have been applied equally on both hands. Perhaps, if you scan it strictly, that may be so; but not the smallest particle of difficulty could arise from that, because there can be no doubt that the court would set it right immediately if it were asked. It is quite a scandal to the administration of justice, that parties should come to your lordships' house upon such a trivial point as that, because something which has escaped the observation of everybody is not strictly square, according to what the language ought to have been. It may be a valid objection, but I trust your lordship will not listen to it for a moment. Then, my lords, we come to the substance of the deed. It is said no relief whatever ought to have been given, upon several grounds. In the first place, it is said that no relief whatever ought to have been given, because the plaintiff in the equity suit, who was the plaintiff also in the ejectment, had no right to ask relief against the children of William Scott, because they were purchasers for a valuable consideration, and without notice. Now, in the first place, how were they purchasers for a valuable consideration? They were purchasers originally under the deed of the 13th June, 1807.

But on the face of that deed it is voluntary; and that being so, it could only be determined on a trial properly directed by the court, whether that was or was not a valid instrument. So, again, with reference to the original deed of February, 1807, how was it to be tried whether it was voluntary or for valuable consideration? On the face of that deed it was a deed for valuable consideration, because there was a covenant on the part of Bindon Scott to pay and discharge his father's debts. That is to all intents and purposes a

valuable consideration. It may be that was a fraud, and that it was merely colorable. The evidence would seem to show the contrary; but whether that was good or not was exactly the question to have been tried at law, and upon which the trial, in truth, proceeded. In the result of that trial, it has been established by the jury that the first deed was voluntary, and that the second was not voluntary. That, upon the motion for a new trial in the Court of Queen's Bench, was partly reversed. The Court of Queen's Bench were of opinion that the first deed was a deed for valuable consideration, and that the second was a deed without valuable consideration. The court consequently directed a new trial. The parties have not chosen to avail themselves of a new trial, and the result must be, that we must consider that judgment to be binding and conclusive upon the parties. Well, then, my lords, what is now insisted upon is, that no relief ought to have been given, supposing the second deed to have been in its inception a voluntary deed, but still, that William Scott's children were purchasers for value. William Scott married, and on that occasion the deed was produced and acted upon. Then, upon the authority of *Brown v. Carter* and two cases, although the deed was voluntary in its inception, yet it is said, as the parties acted upon that deed, and treated it as being the deed which gave the estate to William's issue, and William's wife married upon the faith of that being the deed to provide for her and her issue, therefore the voluntary character of the deed is displaced. But that cannot prevail if the first deed was a good deed, as undoubtedly there is upon the trial no finding of the jury effectual to displace it. It is a valid deed; therefore it is really thus: There are two deeds—a deed for value in February, and, if you please, another deed in June, which, though not then for value, was, according to the arguments, made a deed for value in 1815. By the rule, *qui prior tempore potior est jure*, the first deed in February must prevail, as having been a deed for value, and of course would take precedence over the deed which was subsequently executed.

My lords, it appears to me that the whole case depends upon the fact that the parties acquiesced, in truth, in the notion, that upon the finding of the jury upon this trial it must be taken to be that the jury have found the first deed to have been a deed for value, and the second deed to have been a deed not for value. That being so, it follows of course, that the plaintiff, who seeks relief upon the footing of that deed, which relief would have been purely legal but for the outstanding legal estate, must properly have such relief given to him in equity as to put him in such a situation, as to the validity of the deed at law, as if the estates had been legal, and not equitable. With regard to the suggestion that this outstanding legal fee acquired by disseisin is to defeat the rights of the parties, I do not concur in the observations which have been made. It is admitted that if the party who had so got, by virtue of the statute of limitations, the legal fee, had got it by conveyance, with notice that the party from whom he got it was a trustee—it is admitted that he could not have taken it except upon the trusts upon which the party from whom he took it held. It appears to me that he is exactly in the same posi-

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tion. The legal fee was in Bindon Scott by conveyance ; and whether William, who was in possession of Knoppogue, got it from him by conveyance, or any other means, the result appears to me just the same ; he only holds it exactly in the same manner as the party from whom it came. Under these circumstances it was perfectly right to direct a trial, and the result of the trial must be taken to be that which was the result of the motion for the new trial in the Queen's Bench in Ireland. That being so, the only remaining questions are as to the propriety of the second decree, which appears to me really to admit of no sort of doubt. It was perfectly right that the party should have a decree putting him in possession of that which was outstanding in trustees, and an account of rents for six years, which the court is invariably in the habit of giving, namely, an account of the mesne profits for six years from the person who holds of the party entitled, as if it had been a legal instead of an equitable estate. Under these circumstances, I shall move your lordship that the decree should be affirmed.

LORD BROUGHAM concurred.

LORD ST. LEONARDS. My lords, I also think that this case must be decided against the appellant. As the questions are of some importance, I shall trespass upon your lordships for a short time. As I understand the argument of the appellant, there could be nothing to put the case upon but simply upon the legal title. He says : " I have a legal title by adverse possession, and I am in a situation in which, in a court of equity, you are not entitled to claim relief against me ; therefore I claim legal title alone." Now, as regards his legal title, that came before a court of law in Ireland, and the court of law decided that the legal title did prevail, independently of any equity under the statute of limitations. Now, that depended upon a very nice point. If there had been originally a conveyance in this case of the legal estate, instead of being a conveyance of the equitable estate, it is perfectly clear that the statute of limitations would have been no bar, because then William, taking by a conveyance (which is what distinguishes this from the cases where there is an adverse possession without a conveyance) from a man who, under a settlement, was tenant for life, never could have set up his possession during that tenancy for life ; as the tenant for life he would be tenant, and although it would be conveyed to him in words for, his own life, he never could have set up that estate, so acquired by actual conveyance, as a bar to the remainderman under the settlement, under which the person who conveyed to him claimed. Therefore this singular state of circumstances happened, and the consequence is what I will state. The legal fee was outstanding ; the conveyance, therefore, was only of the equitable estate ; but the person who had the equitable tenancy for life conveyed to William what must be held to pass (with the view I am now regarding it) only his life estate ; thus the remaindermen were not affected. If the person who had thus conveyed ultimately obtained a reconveyance of the legal fee, that was, as regarded him, an admission that the legal fee at that

moment was an operative estate. What was the consequence? The consequence was, that that legal estate, and the lease and release, would not operate by estoppel; and therefore his previous conveyance would not, as in many cases of life interest, operate by way of estoppel against the legal fee which he had subsequently obtained; but the moment that he obtained that legal fee he became the trustee for the persons who claimed under the settlement. Now, who were the persons who claimed under that settlement? The first was William Scott, for he had, by conveyance, obtained the right of the equitable estate of Bindon Scott; and when Bindon Scott, therefore, obtained the legal fee, William Scott became entitled to the equitable life interest of Bindon Scott, to be served out of the legal fee.

Then at law it would have been open, I should have apprehended, to contend (I mean to give no opinion binding myself at all upon that point, but I confess I should be strongly disposed to think so) that under the statute of limitations this view might have been taken of it: This estate, which you (William Scott) claim, you claim by conveyance from Bindon; the legal estate was outstanding, and Bindon gets in that legal fee. Bindon never could have operated against you upon that legal estate, because, if he had been so foolish as to bring an ejectment, equity would instantly have stopped that ejectment: therefore, by the effect of the operation of the conveyance in fee, in point of fact, he was stopped from asserting any right to that legal estate during the whole of his own life. Should not there be a corresponding right? If the one party is to be bound, ought not the other party to be bound? Where was the difficulty in a court of law, I desire to know, to say that William Scott held under Bindon Scott; and that Bindon Scott having obtained the legal estate, the possession of William Scott was the possession of Bindon Scott; and that William Scott, claiming under Bindon Scott, never could be heard to say that he held adversely under Bindon by the settlement under which William alone had obtained a life estate? However, it was decided otherwise, and this house is not going to rescind or to reverse that decision. I am only drawing your lordships' attention a little to the way in which the matter really stands. Well, then, as regards the equity, I can have no doubt in recommending your lordships to hold, as a point of law not to be disputed, that that legal estate became a trust for all these persons, and that consequently, although at law William Scott could, as against the children of Bindon Scott, set up his adverse possession, that was no adverse possession. Although the phrase "adverse possession" may be probably still used in a different sense to that in which it was used before the statute 3 & 4 Will. 4, c. 27, yet I see no difficulty in advising your lordships to come to the conclusion, that that legal estate never could be set up as against those parties who claim to be entitled to the benefit of the estate. The question at last resolves itself into the right, as between these parties under the different settlements, who is entitled to the estate? Take the first settlement, under which Bindon Scott claims. It is perfectly clear, in point of law, that upon the face of that settlement it is a settlement

for valuable consideration, which never can be impeached. No settlement ever was seen more perfectly for valuable consideration than that settlement is upon the face of it.

Like any other deed, it may be impeached by showing that the consideration is not truly stated; that that which appears to be the real consideration was not the true consideration; that it was a sham and a pretence; that there was collusion; that there was fraud. You go to a jury upon that very question, which is to be tried as to the equity between you; you go, by the direction of the court, to a jury to try that very question; and some ingenious gentleman misleads the jury, and persuades them that that which is the real consideration is a sham one, and that which is no consideration is the real one. But what does the court say, when it comes back to the court? The court, with proper notions of law, holds, that upon the face of it, it was one for valuable consideration, and the other was merely voluntary; and then the court states that which has never been contradicted, and cannot be contradicted, that there was not a scintilla of evidence to show that the first consideration was a fraudulent one. No attempt is made to shake that consideration. Well, then, what is the consequence? Why, that the first deed stands, and that the second cannot interfere, with it, as far as regards the consideration. Well, then, you are to go back to a jury to try that question. You have a right to have that question retried, and when the moment comes at which you ought to try that question, you entirely withdraw from the right which has been given to you; you desert the case altogether; you do not attempt to go before another jury, to show that which you might show if you could, namely, that the consideration was a sham one, and not a real one, as it appeared upon the face of the deed. You then let the decree go against you, as it is necessarily did go against you, in the court of equity; and this house is bound to consider, that in withdrawing from the trial of that question, which you had the opportunity of trying, you admit that the consideration in the first deed was a valid and real consideration, and that there was no pretence for alleging the want of the consideration which you set up.

Then, I say, this house must consider it in that respect as a settled point that it was a real consideration. The truth is, when you look at the deeds with the eye of a real property lawyer, all difficulty vanishes. I never could understand where the difficulty was in this case. The first deed was a perfectly binding deed, and there was an attempt to concoct and set up a title as against the deed. I cannot mention Mr. Burton's name without stating the high respect and regard which I have for that learned person, who became so illustrious a judge in Ireland. Mr. Burton says himself what is printed here, that he was pressed with business, and not able to do more than to chalk out the draft. He did not give the advice which I should have expected from his practical knowledge; but he did advise the parties, if the first deed was not upon the register, to do that which no counsel ever should advise parties to do—that is, to put aside and cancel a deed, and endeavor to make a title in lieu of it. In my experience, I never knew any attempt of the sort which did not

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end in failure, and in involving the parties in litigation, probably as expensive and as long as this has been. Now, my lords, the attempt was to get rid of the deeds, and form a new title. Those two subsequent deeds were meant for that purpose. As far as William could found his title upon the previous deed, it is perfectly clear, from the statement, that you must consider that the deed which has never been produced is a deed which contained the power revoking it; you can only have the statement as you find it, that the power was exercised. The consequence is, that the title ceased—there was no real consideration. If there were consideration, the first deed now stands as the deed for valuable consideration; it was prior in point of date, and was upon the register before the second deed was executed. The second deed, whether valuable or not valuable, never could come into competition with the first deed, and therefore the appellant is debarred. I have listened with great attention to the case on the part of the appellant as to the supposed fraud in the outstanding deed. There is not a pretence for the allegation, and no evidence to touch the question. That deed contained other denominations; and Mr. Burton particularly said, and sent this instruction to the parties, that the deed could not be cancelled, because it contained other estates. It was the absolute duty of the solicitor to register that deed, in order to give effect to those titles which were not intended to be affected by the new arrangement. The new arrangement was a contrivance—I regret it was ever resorted to—to defeat the actual title, and it has failed in the object which the parties had. I am clearly of opinion that there is not the least pretence for its affecting the title in this case. Therefore I submit to your lordships that this appeal should be dismissed, with costs.

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MAYOR OF SOUTH MOLTON v. THE ATTORNEY-GENERAL.

May 2, 1854.

*Charity—Gift of the Surplus—Increased Rents of Estates—Construction of Will.*

A. by his will, after reciting that he had founded a school which had prospered greatly, gave and bequeathed to the corporation of S. and their successors forever all his right in certain lands, "provided and upon condition that they do pay" 40*l.* per annum to the said school and certain other specific bequests; and then he said, "the overplus which the said lands do produce, beyond and more than all these disbursements do amount unto, (which I do find and compute to be about 60*l.* per annum,) shall go unto him who is and shall be Mayor of S. for the time being, towards the expenses of the mayoralty." The will referred to an account annexed of the "income and outgoings" of all he had given to the corporation of S.; and, after setting down under "outgoings" all the specific disbursements as expressed in the will, a balance of about 60*l.* appeared, which was described "balance which the corporation of S. will gain per annum; and whatever the balance (*de claro*) proves to be, more or less, it is given every year to him that shall be Mr. Mayor in being." The rents having subsequently greatly increased, and an information having been filed to declare the right thereto:—

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*Held*, reversing the decree of the M. R., that the will contained an absolute and unconditional gift to the corporation of S. of the surplus which remained after paying the specific disbursements mentioned in the will, and that the objects did not share the increased rents in the proportions in which they stood to each other at the time of the will.

The state of the authorities commented on.

Whether *The Attorney-General v. The Drapers' Company*, 4 Beav. 67, was rightly decided?

THIS was an appeal from a decree of the Master of the Rolls.

In 1680, Hugh Squier built a free school and a master's house in the town of South Molton. By an indenture dated in 1686, he assigned them to five trustees, and after reciting his intention to settle 1,000*l.*, or lands to that value, for the better support thereof, he gave directions as to the school, and reciting that there was about 50*l.* per annum, or money to that value, desired to be given by him for a perpetual endowment, he directed 20*l.* each to be paid to two masters, 3*l.* for an annual feast, and 7*l.* per annum, (or what should remain of the 50*l.* per annum,) or thereabouts, for the reparation and improvement of the premises.

On 24th February, 1709, the said Hugh Squier made his will, of which the material parts were as follow: "And whereas I have, about twenty-eight years ago, erected and built a free school in the town of South Molton, in Devon, for the teaching of thirty poor people's children to write and keep accounts, thereby to fit them for any ordinary trades and employments; and whereas the said school hath prospered hitherto very well under the government of five trustees, who had managed that affair according to divers rules and directions contained in a book of orders left with them by me, the founder for that purpose; and my will is that, as often as any two of the five trustees shall die away, &c., and it is expected from those particular men, the five trustees, that they shall take upon them the care of paying out of the revenue of Northam and Upcott and Westminster 29*l.* 2*s.* 9*d.* to the church of Windsor every year, and to do it betwixt Michaelmas and Christmas, for rents and tenths, and 15*l.* at the end of every four years for a fine, for the adding of four years *de novo* unto their lease, or else 30*l.* at the end of every seven years, as their custom of renewing is, together with 3*l.* 17*s.* 10*d.* for the charges of passing and making every new lease, and adding either four or seven years thereunto, and by this renewing at every four or seven years' end, to make their estate perpetual; and, having observed that the church of Windsor did take it more kindly when I renewed at four than at seven years' end, therefore I do recommend to the five trustees to renew at every four years; and for their taking this care particularly upon themselves they shall receive a reward of 20*s.*, I say twenty shillings, per annum, unto each trustee, for all the time they are in this employment; and for the defraying of this charge, and for the afore-said intent and purpose, and also to the further uses that are hereinafter expressed: I do give and bequeathe, unto the mayor and aldermen of the borough of South Molton, in Devon, and to their successors, forever, all my right, title, and estate which I have, or hereafter shall have, in the parish of Northam, in Devon, except the presentation, which is reserved for reasons which hereinafter are expressed, provided and upon

condition that they do permit — Ayres, the present vicar of that parish, and his successors forever, to have, hold, and enjoy the vicarage-house, with the gardens, orchards, and the glebe lands, lands thereunto belonging, or therewith now enjoyed, and also all the oblations, offerings, and surplice fees, and Easter duties that may arise out of the same, and do also pay him, the said Mr. Ayres, and his successors, 16*l.*, I say sixteen pounds, per annum, by quarterly payments; and do also pay the above-mentioned sums, which the church of Windsor doth usually and reasonably require for a fine upon every such renewing of their lease, as their custom of renewing is; and do also pay 5*l.* 15*s.* per annum yearly unto George Whicher his almshouses in Westminster; and also do pay 40*l.* per annum towards the maintenance of South Molton free school, that is to say, 25*l.* to the schoolmaster, 5*l.* to the trustees, 3*l.* for their two usual feasts at their visitation, and 7*l.* for the reparations of the school and schoolhouse, and the highways between the schoolhouse and Molebridge—in all 40*l.* per annum; and the overplus which the said Upcott and Northam do produce, beyond and more than all these disbursements do amount unto, (which I do find and compute to be about 60*l.* per annum,) shall go, the one half thereof always unto him who is and shall be mayor of South Molton for the time being, towards the expenses of mayoralty, and the other half towards the mending of the highways in and near the town of South Molton, in Devon.” The testator then gave three leasehold houses in St. Martin’s-le-Grand to the parish of St. Margaret’s, Westminster, the rents of which were to be appropriated to various purposes; and then proceeded: “And because that several sums, whilst they stand written in words at length, and until they are set down in figures, (the one sum under the other,) cannot well be cast up, therefore, I have drawn up several accounts—the one of all I have now given unto the corporation of South Molton, in Devon, and to the free school which I built there about 28 years ago; and the other of all I have given unto the parish of St. Margaret’s, Westminster. Both of these accounts I do make to be part of this my will; and my will and meaning is, that all what I have given unto the corporation of South Molton, and to the free school which I built there, shall be delivered over unto them by my executors from the time of my death; but what I have given to the parish of St. Margaret’s, Westminster, my executors shall continue to keep, and the profits of it, in their own hands, and to their own use, for one year after my decease.”

The account referred to in the will was as follows, and intituled “An account of the product and of the outgoings of all the things which I have bestowed on the corporation of South Molton, and the free school I built there.”

<i>“Income</i>		<i>£</i>	<i>s.</i>	<i>d.</i>
Of all my estate in Northam, except the patronage and choosing their ministers upon all occasions, which I do give to the parish itself . . . . .				
				125 0 0
All my estate in Upcott, being better than inheritance, per annum . . . . .				
				15 0 0

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Mayor of South Molton v. The Attorney-General.

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A rent charged upon the vestry and parish of St. Margaret's, Westminster, which they are to pay once a year out of 83*l*. per annum which I have settled upon them for this and some other good uses . . . . . 20 0 0

In all per annum . . . £160 0 0

*"The Outgoings."*

For the five trustees 20*s*. per annum a-piece, for their particular care in governing the school, in receiving their rents, in paying the high rent every year, and the accustomed fines, either at four or seven years' end, by which your estate will become perpetual, and the same as Mr. Haach for the Sheaf of South Molton . . . . . 5 0 0

To the schoolmaster of this free school, from the time of my death, per annum only . . . . . 25 0 0

For their two usual feasts of visitation of the school per annum . . . . . 8 0 0

For reparation of the school and schoolhouse, and the lands before it, per annum . . . . . 7 0 0

To the church of Windsor, every year, for their high rents and tenths, &c. . . . . 29 2 9

For a fine of 15*l*. once in four years, and 3*l*. 17*s*. 10*d*. charges for making every new lease—in all 18*l*. 17*s*. 10*d*. at every four years' end, one-fourth part whereof is . . . . . 4 14 5½

To the Vicar of Northam and his successors for the time being, per annum . . . . . 16 0 0

Also to the executors of George Whicher's almshouses in Westminster, per annum . . . . . 5 15 0

£95 12 2½

Balance which the corporation of South Molton will gain per annum, excepting 13*l*. 8*s*. per annum land-tax, whilst that lasteth, and the poor's-rate, whereof the tenant (by his lease) pays the moiety . . . . . 64 7 9½

£160 0 0

"If the taxes to church and poor do not abate somewhat thereof, but the parliament choose to exempt Windsor, and schools and almshouse from taxes; but whatever the balance (*de claro*) proves to be more or less, the half thereof is given every year to him that shall be Mr. Mayor in being, and the other half towards mending the highways in or near South Molton, especially between Molebridge and the schoolhouse.

*Item.* I do desire the corporation, out of their 64*l*. 7*s*. 9½*d*., to pay for the children's pens, ink, and paper."

The testator, Hugh Squier, died shortly after the date of the will, and made no other provision for the school except what was contained in the will. The value of the property had greatly increased, and in 1850 the gross rental amounted to more than 650*l*. a year. The surplus or residue of the clear income, after paying the sum of

40l. to the trustees for the time being of the said school, and also making the other specific payments directed by the will, and after paying for mending the highways near the town of South Molton, had been retained by the mayor and corporation, and applied by them to their own purposes.

On 8th April 1850, an information was filed by the Attorney-General, on the relation of James Miles, of the king's-road, Chelsea, against the trustees of the school, and the then Mayor of South Molton; and it was thereby prayed that it might be declared that the lands and property devised and bequeathed by the said Hugh Squier were held by the corporation of South Molton for charitable purposes only, and that the whole of the rents ought to be applied to the several charitable purposes expressed in the will, in the proportion which the original amount devised as bequeathed to each such charity bore to the whole income of the property, and that it might be referred to the master to take the accounts, and make the inquiries accordingly. The corporation of South Molton, in their answer, admitted the facts, as already stated, and submitted to the court whether they were bound to apply any larger sum than the above 40l. to the said free school. The trustees of the school also put in their answer. The cause came on to be heard before Sir J. Romilly, M. R. on 25th July, 1851, when his Honor made a decree, declaring that the objects in whose favor the rents and profits of the estates had been bequeathed in trust to the corporation were formerly and then entitled to participate in the increased rents, in the proportions in which such rents were given by the will respectively; and a reference was made to the master accordingly: (14 Beav. 357.) Against that decree the corporation now appealed.

The *Solicitor-General*, (Bethell,) and *Karslake*, for the appellants, contended that the will of Hugh Squier contained an absolute and unconditional gift to the Mayor of South Molton towards the expenses of the mayoralty, of one half of the overplus arising from the estates of Northam and Upcott, over and above the disbursements specified in the will. The testator did not, according to the true construction, intend the free school and other charities to participate in the increased rents and profits of the estates in the proportions in which the rents at the date of the will were directed to be applied. Accordingly, the attorney-general had established no case for relief, and the information ought to have been dismissed with costs. Authorities referred to: *Attorney-General v. Mayor of Bristol*, 2 Jac. & W. 294; *Attorney-General v. Draper's Company*, 4 Beav. 67; *Attorney-General v. Skinner's Company*, 2 Russ. 435; *Thetford School case*, 8 Co. Rep. 130 b; *Attorney-General v. Brasenose College*, 8 Bligh, N. S. 377, and 2 Cl. & Fin. 295; *Jack v. Burnet*, 12 Cl. & Fin. 812; *Re Jordeyns Charity*, 1 Myl. & K. 416; *Attorney-General v. Haberdashers' Company*, 1 Bro. C. C. 103; *Attorney-General v. Solty*, 5 Law J. Rep. Chanc.; *Attorney-General v. Grocers' Company*, 6 Beav. 526; *Attorney-General v. Cordwainers' Company*, 3 Myl. & K. 534; *Attorney-General v. Smythies*, 2 Russ. & M. 717.

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*Roll, Q. C., and W. Morris*, for respondents, contended that on a true construction of the will, the free school and the other objects of testator's bounty were to receive the whole of the then income of the property, and that the mayor and aldermen were trustees only of such property. The *cestuis que trust* were entitled to the increased rents in the relative proportions in which they stood at the date of the will: *Attorney-General v. The Merchant Ventures' Company of Bristol*, 17 Law J. Rep. Chanc. Reliance was chiefly placed on *The Attorney-General v. The Drapers' Company*, 4 Beav. 67.

The *Solicitor-General* replied.

The LORD CHANCELLOR. My lords: As this case was opened yesterday, and has therefore occupied two days, it has given time to those who have heard it to deliberate on what the judgment of the house ought to be; and I think we shall not be proceeding with any undue haste, if I ask your lordships now to come to a decision of the question before you. In general, it is your lordships' habit to consider cases some short time before you give your judgment; but, as in this case an opportunity has been afforded us of looking into the authorities since the case was opened yesterday, I feel no difficulty in moving your lordships to come to a decision at once. My lords, I cannot but think that this decree, which I for one conceive to be erroneous, was pronounced in this case in consequence probably of the attention of the very learned judge by whom it was made having been directed into a somewhat erroneous channel; because I observe that the arguments seem to turn on the question whether this is what is called a condition or a trust. That really is an argument entirely beside the merits of the case. This is a case in which the only point really to be decided is, what were the intentions of the testator, legitimately to be collected from the words of his will? My lords, I will consider the case first of all assuming that there had been no decisions on the subject of these charitable cases, but that we were now deciding the question for the first time. I cannot but believe that, if we were in that state of things, there could be no two opinions on the subject. The language seems to me to be so perfectly clear, that nothing but the former decisions, which are supposed to fetter your lordships' judgment, can at all raise a doubt about the matter. This testator, having an interest in the town of South Molton, in which place some twenty-five or thirty years before the date of his will he had erected a school, for the purpose of having reading, writing, and arithmetic taught—in some degree a classical school—makes his will. By that will, he appropriates certain property, which he desires shall be held for keeping up the school. And the way in which he does so is this. After stating that his property consists of leaseholds, to be renewed at certain intervals of either seven or four years—he recommends four years—he proceeds thus: "And for the defraying of this charge, (that is, the charge for keeping up the estate for the benefit of the school,) "and for the aforesaid intent and purpose, and also to the further uses that are hereinafter expressed, I

do give and bequeathe unto the mayor [his lordship read as above set forth down to the words] per annum yearly unto George Whicher his almshouses in Westminster.

Now we come to the part which gives rise to the main question before your lordships: "And also do pay 40*l*," &c. [reads to the words] "towards the mending of the highways in and near the town of South Molton, in Devon." Now, supposing it had ended there, and there had been no authority fettering your lordships' judgment, I would ask, with confidence, could anybody doubt that what was to go to the school was the 40*l*. a year; and that, whatever the surplus was, be it more or less, it was to go one half to the mayor, and the other half towards keeping in repair the highways? If it had rested on the part of the will, I should have said there was not the least doubt on the subject. If that even were at all doubtful, it seems to me that any possible doubt which there might have been, independently of the authorities, would be cleared up by what follows at the foot of the will, which is this. The testator, remarking that it would be difficult to tell until he had reduced the account into a tabular form what the fractions were, refers to an account which he proposes to add, and does add at the foot of his will, "an account of the product and of the outgoings of all the things which I have bestowed on the corporation of South Molton, and the free school I built there." He had given this property to South Molton, for the benefit of the free school. But some attempt is made to raise a doubt upon the expressions, as if he had given it to the school as well as to the corporation. That is reasoning in a way that I must confess I cannot quite understand; he had given it to the corporation and to the school—to the corporation for the benefit to a certain extent, of the school, and for certain other purposes for the benefit of the mayor, who was member of the corporation. That is the loose way in which he describes the account. He then goes on giving an account of his income, and he puts the estate at Northam of the value of 125*l*.; that at Upcott at 15*l*., and then there is a rentcharge upon the parish of St. Margaret, Westminster, of 20*l*.; making, altogether, 160*l*.

On the other side, there are the outgoings. He enumerates the 40*l*. in different proportions for the school; then he states the rent payable to the Dean and Chapter of Windsor; he estimates the fines payable every four years at 4*l*. 14*s*. 5½*d*. the payment to the vicar 16*l*. a year, to the almshouses at Westminster 5*l*. 15*s*.; and then he adds: "Balance which the corporation of South Molton will gain per annum, excepting 13*l*. 8*s*. per annum land-tax, whilst that lasteth, and the poor's rate, whereof the tenant (by his lease) pays the moiety, 64*l*. 7*s*. 9½*d*." That is what he describes as the sum which the corporation of South Molton will gain. What does that mean, supposing it had stopped there? Does not that clearly show that he estimates the estate as then worth 160*l*. a year? He appropriates all these different disbursements, some of which will certainly forever remain the same, namely, the rent payable to the Dean and Chapter of Windsor—the fines of course would be fluctuating—and then he states this as the balance which the corporation of South Molton will

gain except that they will have to make certain appropriations for land-tax and poor's rate. Can any one doubt that what he means is that the corporation, receiving this rent, are to pay 40*l.* in the way he puts it, to pay the fines, to pay the sums to the vicar and to the almshouses; and the balance is what the corporation will gain for what he calls their purposes? It is not strictly, however, for their purposes; one half is to go to the mayor, the other half is to go to repairing the highways. The testator must have been aware that the amount, upon which the balance was to be calculated, would fluctuate—the gross sum would fluctuate, (not the 64*l.* 7*s.* 9½*d.*), because the fines would vary. He therefore adds: "If the taxes to church and poor do not abate somewhat thereof, but the parliament do use to exempt Windsor, and schools and almshouses from taxes; but whatever the balance proves to be, more or less, the half thereof is given every year to him that shall be Mr. Mayor in being, and the other half towards mending the highways in or near South Molton." My lords, I cannot imagine language that a testator could adopt more directly and more pointedly alluding to the circumstance that he did not want to have any question raised about whether it was 60*l.* or 64*l.*, or whatever it might be. He points out those causes which would influence the amount; but, be it more or less, he gives one half to the mayor, the other half to mend the highways. An unlearned person, who knew nothing whatever of the decisions, that have taken place on the subject of these charitable questions, could not have a doubt about it.

I must not, however, overlook the circumstance that the M. R., in alluding to this note, interprets this doubt as to the amount of the balance, not in the way in which I should interpret it, as meaning to say, in a general way, that it will fluctuate from different causes; but, putting the question in a very neat way, he considers that the 64*l.* 7*s.* 9½*d.* is represented as a definite proportion, but subject to indefinite charges. Then he says: "Although the sum to be received and that they will gain according to the language of the testator, might fluctuate, that will not be because the 64*l.* 7*s.* 9½*d.* will vary, but because the charges upon the 64*l.* 7*s.* 9½*d.* will vary." I confess I think that there is somewhat of refinement in that; but that, in truth, that is not a correct view of the case, because the 64*l.* 7*s.* 9½*d.* may vary by reason of the fluctuating nature of the fines which have to be paid; and, although the testator estimates what it was at that time, it cannot have been absent from his mind that that would make the 64*l.* 7*s.* 9½*d.* vary; and although his language is not perhaps the most accurate, such as a conveyancer would have used for the purpose, yet, when I see that the object of the testator was to constitute a surplus after payment of these disbursements, one half of which is given every year to the mayor, the other half towards the repair of the highways, I confess it seems to me to be a matter that, independently of authority, does not admit of the least doubt in the world. Everybody would say that the 40*l.* is to go to the school; the 29*l.* 2*s.* is to pay the rent at Windsor; 4*l.* 14*s.* 5½*d.* is to go for the fines; 16*l.* to the vicar; 5*l.* 15*s.* to the almshouses; and the surplus, be it more or less, the corporation are to take for themselves.

If it stood independently of authority, there could be no doubt upon the case. Then, is there any thing in the authorities which have been quoted, that is to compel your lordships to do that which it is always most distressing to do, namely, to decide that a testator's language is to be interpreted as meaning something which every one of your lordships must feel perfectly satisfied is not what he meant? Is there any thing which will compel your lordships to adopt such a construction? The principle which has been relied upon for inducing such a necessity (a very sad necessity if ever such should exist) is, that there has been a current or stream of authorities which have led to putting a particular construction upon language of this sort, and which must govern the present case. I agree with what was said by Lord Eldon, that where there has been such a current of authority, or a single old authority very long acted upon, however anomalous, it is much more to the interest of mankind that it should be followed, rather than speculate on whether it is right or wrong, and adopt a construction apparently more reasonable and more in accordance with modern times. But I confess that I see nothing in any of the authorities which necessarily leads to such a conclusion. The earliest authority is the case reported in Lord Coke, the Thetford School case. That was a case in which a testator gave an estate worth 35*l.* a year for charitable purposes, for the maintenance of a schoolmaster and ushers for the poor; and he provided that the usher was to receive 8*l.* a year, and the schoolmaster 10*l.* a year. In course of time the property rises in value, and becomes worth 100*l.* a year, and the question then arose, whether any thing more was given to the charity than the 35*l.* a year.

The question was a comparatively new one at that time, and, after an elaborate argument, it was decided, that, although 35*l.* a year was all that was so apportioned, 35*l.* a year was all that the estate then produced. The estate was given for the maintenance expressly of the schoolmaster, the usher, and other persons, and the whole was held to be given, and not a part only. In referring to similar cases, Lord Eldon has remarked that it may be very doubtful whether that or any other case having a similar aspect would, if it were now to be decided for the first time, be decided in the same way. I do not know that there is any thing very material in that decision, even if it were now to be decided for the first time. But it appears to me that that case has not the least resemblance to the present. If this testator had said: I mean to give my estates at Northam and Upcott, now worth 160*l.* a year, for the benefit of the school which I have established at South Molton, and I give 50*l.* a year to the master, and 50*l.* to the usher, and 60*l.* to so and so, apportioning the whole; then that case would govern the present. If it had now risen to the value, as the relator here alleges, of 800*l.* a year, the whole would be so apportioned. But here, there is nothing of the sort. The testator makes a distinction, between what he appropriates to the school and the surplus, which he has given, not to the school, but to the corporation. It appears to me, that case really does not touch the present. That case was followed by a number of other cases where the estate was

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given for charitable purposes, and certain specified portions of the rents were appropriated in a particular way. There are the cases of *The Attorney-General v. Arnold*, Duke, 59; and *The Attorney-General v. Johnson*, Amb. 190; and the court, in considering those cases, always found their way to the conclusion (whether correctly or not, we have not now to decide) that, although that which was appropriated was not the whole of the rent, yet the whole was intended to be dedicated, and the surplus remained to be applied by the court, either to the same charity that was indicated by the testator, or to some other charity. Then arose, in more modern times, the cases of *The Attorney-General v. Smith*, 2 Vern. 746; *The Attorney-General v. Brasenose College*, 8 Bligh, N. S. 377; and *The Attorney-General v. The Corporation of Bristol*, 2 Jac. & W. 294; in which the tendency of the decisions went exactly in the opposite direction. Those were cases where estates or sums of money had been given to charities, and the surplus given to somebody else; and in those cases it was held, that there was nothing whatever in the doctrine of the Thetford School case, or the cases of *The Attorney-General v. City of Coventry*, Bun. 290, or *The Attorney-General v. Arnold*, Duke, 591, or *The Attorney-General v. Johnson*, Amb. 190, to compel the court to say that the parties to whom the surplus was so given, did not take it, as it was expressed they should take it, for their own benefit. Then, there came in modern times the case before Lord Langdale, which is the sheet anchor of the respondents, and which they said was so conclusive that, if this case were decided otherwise, it would have the effect of overruling it. I mean the case of *The Attorney-General v. The Drapers' Company*. In that case, the testator gave a sum of money to certain persons, with directions that they should out of it purchase land, which should yield a net income of 100*l.* a year; and then the rent was apportioned to the extent of 96*l.* a year to a certain specified charity; and as to the residue, being 4*l.* a year, the testator gave it to the trustee. Lord Langdale there held that, the estate having increased materially in value, all the recipients would increase in proportion, and that those who took the residue would only take in the proportion of 4*l.* to every 100*l.*, and were to vary and fluctuate with the other objects of the testator's bounty.

For aught I know, that decision might be exactly what your lordships would have come to. We have not the will before us—every thing in these cases turns upon the exact language of the will. I do not think that, because a testator describes the last gift that he makes by the term “surplus” or “residue,” it necessarily follows that he means to put the person to whom that is given in a different class from those who take the other gifts that are not so described. It may be that the term “residue” or “surplus,” is used only as describing the *quantum* that the individual is to take; and if there were any case in which it could be fairly interpreted by the word “residue,” it was in such a case as that which was before Lord Langdale, because there it was specifically said: “Purchase that which shall yield a net value of 100*l.* a year;” and then he gave 96*l.* a year to different charities, and the residue, being 4*l.* a year, to somebody else. It

might well be that, looking at the whole contents of the will, the court would come to the conclusion that, although it was described as "residue," it only meant that the party should take his 4*l.* a year just as the other recipients were taking theirs. All that must depend on the particular language of the will: and without having that language before you, your lordships cannot say yourselves it is not incumbered by that decision. Then, my lords, if I am correct in saying that it is to the particular language of the will and to the circumstances that we must look, in order to see whether the word "surplus" or "residue" is to be taken as indicating surplus or residue properly so called, or merely as indicating a share of the rent — if for that purpose, we may fairly look to the language of the will and to the circumstance attending it, I think upon ANALYSING AS THIS WILL, there cannot be the least doubt that here there is not only NO INDICATION as to use the word, but that there is every indication that that could not have been the meaning.

I put the question to Mr. Holt, in the course of his very able argument, whether he meant that there was to be a variation in the amount of the rent received from year to year in the payment of the variation in the 6*4*l.* 7*s.* 9*d.*: because, if so, what would be the fraction upon which you must calculate it? It would not do to have it calculated in a loose and rough manner. It might be very easy to do it in a case where 96*l.* a year is given to certain churches, and 4*l.* a year to other parties; but here to make such a calculation you must have a fraction in which the numerator would be 37,000, and the denominator 36,000 odd. I do not rely very much on that argument, because the case appears to me abundantly clear independently of it; at the same time I must say that, before we can take *The Attorney-General v. The Drapers' Company* as a case which ought to govern the one now before your lordships, we must look to all the circumstances; and one material circumstance is the character of that which is the surplus, and the impossibility that there could be an apportionment made upon the different charges which would work any thing like justice. For these reasons I am of opinion that the very learned judge here has come to an erroneous conclusion, and that consequently, this judgment cannot be sustained. My lords, there are minor points upon which, if a proper case had been made out, if the matter had been free from other objections, possibly an inquiry might have been reasonably asked for. The only interest that the school at South Molton can have, when it is once decided that the surplus goes to the corporation, is this — they have an interest in seeing that the security for their 40*l.* a year shall not be damaged.*

The allegation is, that by the mismanagement of the trustees a sum of 20*l.* a year, that was payable from a certain parish in London, has been irrecoverably lost by lapse of time: and that a field called the Chapelfield, which forms part of the leasehold property, has been improperly given up by them to the church commissioners to build a chapel for the benefit of the inhabitants of the town. The information is filed by a person apparently an entire stranger, having no connection with the town, residing in the King's-road, Chelsea;

and the information states, that the present net income of the charity estates exceeds 800*l.* a year, therefore, that being so, it is somewhat unjust on the part of those who have only a charge of 40*l.* a year; to question that which has depreciated the value of this 800*l.* a year, by taking from it a particular field for building a chapel for the convenience of the inhabitants of the place. But, independently of that consideration, I think there are grounds that exclude the present relator from any title to raise such a question in this suit. In the first place, he could not get relief here without having before the court other parties, because the purchasers have got this ground, and they might raise defences and show that they are entitled to keep this field. For what the defendants say in their answer, and which is entitled to great consideration, is this: It was not a fee simple property of theirs; the Dean and Chapter of Windsor say: Whether you consent or no, when the lease comes to be renewed, it will not be renewed except on the terms of our appropriating this field to the chapel; therefore, all the breach of trust that could have been alleged is, that these parties consented to anticipate that which in the course of some years the dean and chapter would have done without them, namely, to appropriate a piece of ground for the good of the town for the building of a chapel. It seems to me that it would be a very improper example, and a very dangerous course, to allow parties to file an information, raising what would, if well founded, be a substantial, and available question, and then to have a sort of peg to hang something on to relieve themselves from the costs, if they should fall, which they will, if your lordships concur with me in thinking they fail in establishing what is the real point in the case. I should therefore humbly advise your lordships that this judgment ought to be reversed, and that the information ought to have been dismissed in the court below, with costs.

**LORD BROUGHAM.** My lords: I entirely agree with my noble and learned friend. It appears to me that there was a miscarriage in the court below, and that this information ought to have been dismissed with costs instead of the decree having been made which is now brought before your lordships by appeal. With regard to the cases upon this subject, there was at one time some little doubt as to one of them; but now, when by the course of proceeding in the Court of Chancery and also in the Court of Appeal those cases have clearly established the law upon which your lordships are called upon to decide, there can be no longer any doubt about it. It was at one time supposed, from the earliest case upon this matter, the Thetford School case, that there was some countenance given to the doctrine that, where a fund is given to certain individuals, specifying their proportions, and nothing more is said, they shall take any increase of that fund which occurs, in the same proportion. But another proposition was held to be deducible from that case, not actually decided, but deducible by inference from what is there said, that where a fund or estate is given to certain different objects of charity, such proportions being specified with respect to some of those objects

and done with respect to others that they all equally take in the same proportions as well those with respect to whom no specification and no proportion is made as those respecting whom there is a proportion and specification stated. I do not consider that this can at all be deduced from the Thorndon School case and I am silent in reference to that case in the *Lawyer-General v. Corporation of Bristol*, 2 Jac. & W. 244 speaking of the supposed inference to be drawn from the Thorndon School case expresses his plain and open dissent from it and says that in such a proposition there is no authority whatever. Now, supposing that had been so in the Thorndon School case, for it would not go to the length of this case for this case has a most material addition to it that there is not only a silence, which the alleged inference in the Thorndon School case assumes as to the proportions in which one of the houses of the gift shall take, but there is an express statement of the object. The surplus or residue is jointly disposed of in favour of one party and to the exclusion of those who are to take their shares in specified proportions. After stating the disbursements and charges he says:—“And the overplus which the said Thorndon and Barnham do receive (which I do find and estimate to be about 60*l.* per annum)” is to go one half to the mayor the other half to the poorer of the wards between such a point and the school. Now, the only point that is raised upon this must be raised upon the words “which the majority” (which I do find and estimate to be about 60*l.* per annum.” It is only a computational or estimated mode by the testator when he was making his will of the amount of the disbursements and the value of his property: and he says: “My calculation, my estimate is that, taking it altogether, it will be something less than 1 year.”

It is still more clearly given as my noble and learned friend has already pointed out in the account in which the will reads where the words are “balance which the corporation of South Merton will gain per annum.” This is evidently the method which the testator took of summing up all the items in the account in order to make the two sides of the account square. There was 10*l.* on the debit side, and this is my estimate, my computational mode to make out a sum of 10*l.* on the credit side. But I ought not to enter further into it, because my noble and learned friend has so distinctly directed your lordships’ attention to it, that he says:—“Whether be the balance, that which I have calculated at 6*l.* 7*s.* 6*d.* whether it be more or whether it be less, it shall go the one half to the mayor of the town for the time being, the other half towards the poorer of the roads.” I cannot as my noble and learned friend has well expressed fancy any words more jointly intelligible than he was here dealing with the surplus. But all this is a statement of the testator’s estimate or mere guess at the time he made it. So with regard to the next item:—“I do desire the corporation out of their 6*l.* 7*s.* 6*d.* to pay for the children’s pens, ink and paper.” that is to say that is my estimate of what it will amount to: but whatever it may come to be it more or less, I charge it with the payment of that sum. I think my noble and learned friend has very justly stated that the case upon

which so much reliance was placed in the court below, and upon which the very able and learned judge who decided this case appears to have so much dwelt, of *The Attorney-General v. The Drapers' Company*, for the reasons which have been given by my noble and learned friend, ought not to interrupt your lordships in coming to a just decision of this case upon that point, which alone is now before us—what was the real meaning and intention of the founder of this charity, the maker of this will, and what is the meaning of that passage which has been more than once referred to in the account to be found at the foot of the will. I have, therefore, no doubt your lordships will do right in reversing this judgment, and doing that which ought to have been done in the court below—namely, dismissing the information, with costs, up to the hearing.

LORD ST. LEONARDS. My lords: I entirely agree with my noble and learned friends in thinking that this decree should be reversed. I must say that the case lies in the narrowest possible compass. It is much too late in the day now to be disputing about the points of law—they are thoroughly settled by the decisions; and the question really resolves itself upon the will, as to what was the intention of the testator. As regards the law, it lies in a very narrow compass indeed. If the rents of the estate be given, they represent the estate. If the rents be given in certain proportions, so as to exhaust the whole of the present rents, and if no one is entitled to be benefited more than another beyond that which is specifically given, that is a representation of the estate itself in those proportions; and, if the rents increase, each recipient will have his proportion increased accordingly. And what will be the consequence of that? That, if the rents decrease, every man's proportion will decrease in the same ratio. No man can take a benefit under that rule who will not be subject to a burden; and if, therefore, the estate be doled out by a gift of portions of the rents, which represent the estate, as the increase will go to the parties in the same proportion, so the decrease must be borne by the parties in the like proportion. If there be in the second class of cases a dedication of the estate to a charity by a clear intention, expressed or implied from what is stated in the will, there the whole estate must go to the charity, although the entire rents are not disposed of specifically. The cases of the third class are a little difficult; and they have sprung, mostly, no doubt, out of the *obiter dictum* in the Thetford School case. For instance, take any of the modern cases, which have been referred to, in which, in point of fact, there was no gift of the residue, but a gift to a particular body—a college, for example—for the benefit of that college, and to certain persons belonging to that college, or to certain poor persons, confining the objects *ultra* the college to particular sums named; and then the question arose, what is the meaning of that? It is a gift to the college, and to the bursars, for example—the particular objects have 10*l.* a year given to them.

Now, that the rents have been increased so greatly, are they not to take in the like proportion, with reference to the original gift, with

the body of the college, any increase of rent? After a considerable struggle with the courts below, the Court of Appeal has in every instance confined the particular objects to the sums specifically given, and left the bulk of the property, with a full increase, to the body to whom no particular sum was given. So that in all those cases, there being no gift of the residue as residue, but only a gift to the body, the whole residue has been held to vest, however large it has become, in the college for example, and without any right to any increase on the part of the particular objects of the bounty of the testator. I asked the learned counsel, who was addressing the house on the part of the respondent, what would be the consequence in this case if there was no gift of the residue? He endeavored to make out that, in that case, there would be, of course, the same consequence. But the cases clearly establish that, if there had been no gift of the residue in this case, if there had been perfect silence respecting it, the corporation would undoubtedly have taken the whole of the property, subject to the particular reservation. That, I apprehend, admits of no doubt. Now, it would be very singular if, in the case I put of there being no gift of the residue, the corporation would have taken the residue, and yet if, there being an actual gift of the residue, they were excluded from any thing beyond the actual residue at the time of the testator's will; whereas, whatever might have been the increase, (which might have been 10,000*l.* a year,) they would have taken the whole of that increase without any gift at all. So that which was expressed must have been considered to have excluded them from that which they took by implication without any expression. My lords, I asked another question, which appears to me to decide this case. I asked whether the respondents contended that, if there was a deficiency of the rental, then the 40*l.* a year was to give way in proportion to the residue? And the learned counsel was necessarily compelled to say, "Yes."

I take that to be as clear as any proposition ever stated in law, that, according to the authorities and according to this will, the 40*l.* a year never was to abate a single shilling while the rents of the estate would have produced that money, though the residue would have been nothing. I think that is perfectly clear, both in law and from the intention of this testator. And then, as has been observed, the party who is to take the property must also bear the burden. The cases have decided that, the moment you are compelled to hold that there is a deficiency, these particular parties are not to bear that deficiency. I cannot agree that the framing of this devise is not important as regards the question whether it be a condition, or a trust, or whatever you call it. This is a case in which a particular charge is thrown upon the property, and, subject to that charge, the property is actually and positively given to the corporation. Now, if it be given to the corporation, and all the beneficial interest be not disposed of from them, and no intention be shown upon the face of the will to dedicate the whole to charity, it is quite clear that the corporation would take it unless there is some express term upon the face of the will to show an intention that they shall not do so. Now, there has

been a little mistake, I think, as regards the form of this will. It is supposed that the testator spoke as if he had given the property to the corporation and to the free school. He spoke of the property that he had given to each—that is, he has given to the free school certain charges out of the property, he has given them property subject to those charges, and subject to other charges to the corporation. Then, it is said that these gifts are not to the corporation, but to the mayor individually, and to the highways. And that observation was made in order to take away the force which belongs to the actual devise of the property to the corporation, subject only to these charges. The answer to that is, that the testator has told you, over and over again in this will, that he considers the gift of the residue to be to the corporation. He has told you, in several parts of the will, that the gift is to the corporation. The corporation represent the town; and one half of the expenses of the mayoralty were to be defrayed out of the surplus, for the benefit of the corporation, thus saving the corporation for the time being half the expenses of the mayoralty, so far as that fund would go. The expense of the repair of the roads would necessarily fall upon the town, as represented by the corporation. Therefore, at that period, in point of fact, the gifts were gifts to the corporation, in the sense in which the testator speaks of them.

If you turn to the will, it is exceedingly important as regards the intentions of this testator; and it seems to me to be perfectly clear what he intended, from the language which he uses. He is speaking of the trustees of the school which he had established, and he directs that they shall pay out of the revenue of the estate certain sums for renewals and so on. They are to take upon themselves the trouble of doing that; and in respect of doing it, he gives them 20s. a year each. What do you find afterwards? That when he has given the estate to the corporation, the corporation are to pay those sums to the trustees, in order that they may take upon themselves the trouble to do what he has pointed out; and then, after having directed these payments to be made by the trustees of the school, he says: "And for the defraying of this charge, and for the aforesaid intent and purpose, and also to the further uses that are hereinafter expressed, I do give and bequeathe unto the mayor and aldermen of the borough of South Molton," so and so. My lords, I cannot possibly treat lightly the form and meaning of this will. Having directed the trustees of the school to expend certain moneys, which he afterwards directs to be paid out of the amount of the rent, (subject to that charge; therefore there is a charge on the property to that amount,) he devises the estate itself to the corporation forever, for the purposes before expressed, and for the uses afterwards expressed, on condition that they shall do certain things. I do not at all deny that the words are sufficient to create a trust, and could not be construed as a mere condition to be taken advantage of by nobody but by the heir at law.

For example, it is not a strict condition in law; but it amounts to this: "I devise this estate to you the corporation forever, subject to the charges that I have imposed upon it, and subject to the provision

that I afterwards make." But he there gives certain specific sums, and gives them in a way that it would be utterly impossible at any period, under any state of the law, that the corporation could have ever resisted making these payments in full while the rents were sufficient to answer them; or, if the rents fell below them, they must have apportioned them accordingly. But they never could have retained a single shilling for themselves, whilst any of these payments required to be made. It is a gift to the corporation, subject to those particular charges. If, therefore, there had not been a word said about surplus, I should hold it would have been utterly impossible to have argued, with any hope of success, that the corporation should not have taken the whole property subject to these charges. The testator, naturally enough, had a fancy for endeavoring to see how he had disposed of his funds. He says: "I give 10*l.* to one, and 5*l.* to another, and 4*l.* to another, and so on. I must put them down." He balances, as any man would do, his accounts; and he says: "I have got 160*l.* to dispose of; let me see how I shall do it." He puts it down; and then he comes to the fractions, which it is necessary for him to set out, in order to enable him to balance his account. But does he show by that an intention, if there should be any rise in the rents, to take from the corporation that which he has already given to them? He has given to them the whole estate, not on any trust, but upon the particular condition that they shall pay those particular charges. It does not remain there. He does not speak of them as jointly with others. We are told they are joint devisees—joint legatees, if you like to call them so. That argument amounts to nothing. The argument is, that the 40*l.* a year, for example, represents a given portion of the estate itself, whatever it may produce. Is that the way in which you speak of disbursements? How does any man speak of his own estate in making his will? He puts down on one side his means, and on the other his disbursements. These are the expenses of the corporation. Of course, they had their payments to make. That is not the language in which a man speaks of charges which he means to represent as made on a portion of the estate itself. If you come to the case of *The Attorney-General v. The Drapers' Company*, taking it for granted that that case was properly decided, by dealing out the exact amount of rent, you do in effect dispose of the rent in those particular proportions, whatever the rent may be.

And, as I before observed, if the amount is to be increased in the one case, so the amount must be decreased, if there be any occasion for it. Here, it is not a question of inclusion—it is a question of exclusion. We are asked to exclude the corporation. What is the ground? The testator says that he gives them, after these disbursements, all the overplus, which he computes at about 60*l.* a year. Can any thing be more clear than that he speaks of that sum, not with the view of preventing them from taking whatever may be the amount, but to show what the present benefit was. I do not know how the words are to be got rid of at the end, where he states, "whatever the balance may be, be it more or less." Why am I to exclude those

words, if they are necessary, or why am I to suppose that those words are ambiguous? We are told that that is to be regulated by the amount of charges upon a given sum mentioned. I, of course, understand how this argument is put; but I do not understand the weight of it. We all understand the application of the Thetford School case, and we know how it would operate; but if you come to an uncertain and necessarily fluctuating surplus, given *quà* surplus, the question in the result would come to this: Is this surplus, if it be necessary to be given at all, given *quà* surplus? Or is it given as so much money, as representing a given portion of the estate with reference to the other sums? It does not bear a moment's argument. It is perfectly clear that it was given *quà* surplus. It represented the surplus at that time; and whatever is surplus, is surplus to all time. And, therefore, nothing is taken from the corporation by these particular gifts. They already had the surplus. It was necessary to exclude them by some clear expression. So far from being excluded, I am satisfied that no such thing was intended. Every single passage satisfies me that they were intended to be included by the testator.

And, therefore, I very cordially concur with both my noble and learned friends in the conclusion at which they have arrived. With regard to the costs, I entirely agree likewise. I think that this is one of those cases that ought not to be encouraged. Here is a case in which, after a century and a half, there has been an attempt to disturb an arrangement which nobody ever thought of impeaching before. There has been plenty of opportunity of doing it. This case was brought before the commissioners in 1823, and then no step was taken, and every thing was thought right and proper. There was another commission at a much later time, namely, in 1838, which was intended to wind up all these cases. This is one of those speculative cases that I did hope were entirely at an end. They were at one time a disgrace to the law, and they were put a stop to. I am sorry to see an attempt made to revive them. It would have been right enough if the case had been made out according to the decree below; but, that failing, there is no ground whatever, in my opinion, for your lordships to make any of the inquiries or directions which have been sought for. But, I think that the costs should not be given against these parties beyond the hearing — and for this reason simply, and for no other, that the learned judge in the court below having directed those inquiries, and this relator having proceeded upon his direction, it would be hard upon him to pay for what was actually adjudged. I therefore think, that there should be no costs subsequent to the hearing, but that there should be costs up to the hearing; and I do trust that this will be the last case in which an attempt will be made to unsettle any of these ancient charities.

*Decree reversed, with a declaration and a remit.*

## RANGER v. THE GREAT WESTERN RAILWAY COMPANY.

May 31, June 2, 3, 6, 7, 9, 10, 13, 14, 16, and 17, 1853; and May 26, 1854.

*Equity — Railway Contractor — Penalties — Account — Engineer's  
Certificates — Engineer a Shareholder — Company taking Possession of the Works and Plant.*

In a contract between R. and a railway company, for the performance by R. of a portion of the line of railway, after reciting that R. agreed to secure the due performance of his contract by his bond in the penal sum of 4,000*l.*, conditioned for the payment to the company of certain fixed sums for every week in which the work should not be completed according to the contract, the penalty in each successive week to increase in a fixed proportion, it was witnessed, amongst other things, that in case R. should become insolvent &c., or should from any cause whatsoever (not the act of the company) not proceed in the works to the satisfaction of the company, the company might give to R. a notice in writing requiring him to proceed with the said works, and in case R. should for seven days after such notice make default in commencing or regularly proceeding with the said works, it should be lawful for the company to employ other persons to complete the works, and pay them out of the money which should be then remaining due to R. on account of this contract; and that the moneys previously paid to R. on account of any works should be considered as the full value, and be taken by him as in full payment and satisfaction, for all works done by him; and that all moneys which either then or thereafter would have been payable to R., together with all the tools and materials then being upon the works, should, upon such default as aforesaid, become and be in all respects considered as the absolute property of the company; and that if such moneys, tools, and materials should not be sufficient to pay for the completion of the works, then R. should make good such deficiency on demand. It was then further witnessed, and the company covenanted to pay to R. for the completion of the works the sum of 63,028*l.* 16*s.*, in the following manner, namely, every fourteen days four fifth parts of the whole value of the said works which shall have been actually performed during the preceding fourteen days, until there should be a reserved fund of 4,000*l.*, and then every fourteen days to pay the full value of such works, such value to be estimated by the principal engineer or his assistant, having reference as well to the prices in the schedule (as to extra work) as to the entire cost of the whole works; and at the expiration of one calendar month after the completion of the entire works, to pay one moiety of the 4,000*l.* so retained in the hands of the company, and at the expiration of one year and a month the remaining moiety of the 4,000*l.* And it was lastly agreed, that during the progress of the works the decision of the principal engineer for the time being of the company, with respect to the amount, state, condition, &c., or any other matter or thing whatsoever relating to the same, shall be final, and without appeal; but in case of dispute, after the completion of the contract, as to any matter of charge or account between the company and R., such dispute shall be finally settled by the arbitration of the said engineer on the part of the company, and an engineer appointed by R. on his part, or if they disagree, by an arbitrator to be named by them. After R. had proceeded to a very considerable extent towards the completion of his contract, the company, being dissatisfied with the progress of the works, gave the notice to R. mentioned in the contract, and after seven days they took possession of the works, and of all the tools and materials thereon, and completed the works by other parties. R. filed his bill, setting up a case of fraud against the company in concealing the nature of the strata through which cuttings and tunnels were to be made, and insisting that he was entitled to be paid for those works at fair prices, regardless of the contract; that the fortnightly certificates of the value of the works given by B., the engineer of the company, were void, and not binding upon him, in consequence of B. being a shareholder in the company, that he was entitled to be relieved against certain money penalties which had been charged against him in the engineer's certificates; that the company were not justified in taking possession of the works, tools, and materials; and that he was entitled to have an account taken of the value of the works done, on the footing that there were no contracts, or that

<sup>1</sup> Before the Lord Chancellor, (LORD CRANWORTH,) LORD BROUGHAM, and other Lords.

*Ranger v. The Great Western Railway Co.*

they were abandoned; and that the company might be debited with the value of the engines, tools, materials, articles, and things of which the company took possession :—

*Held*, first, that no case of fraud had been made out. But *semble*, that although a corporation cannot be guilty of fraud, yet if their agents employed in carrying out a trading speculation be guilty of fraud, the corporation will be liable.—Per the Lord Chancellor.

Secondly, that the principle which prevents a person being a judge in his own cause, (*Dimes v. The Grand Junction Canal Company*, 17 Jur. 73, s. c. 16 Eng. Rep. 63,) does not apply to the case of the engineer of a railway company holding shares in that company, who, according to the terms of a contract between the company and a contractor, was during the progress of the works to give periodical certificates of the value of the works done, but which on the completion of the contract were not final.

*Semble*, it is not necessary to institute minute inquiries as to how far the engineer's calculations, in making out his certificates during the progress of the works, were accurate; it is enough if they were made *bonâ fide*, and with the intention of acting according to the exigency of the contract.—Per the Lord Chancellor.

Thirdly, that the money penalties had been properly charged against R., they being, upon the proper construction of the contract, not penalties, but liquidated damages.

Fourthly, that even assuming that the company were not justified in taking possession of the works, tools, and materials after the notice given, R. was not entitled to treat the contract as not existing, or as abandoned. R.'s right would have been by action for damages, and the seizure by the company formed no ground for such equitable relief as was asked.

Fifthly, that, upon the true construction of the contract, the company did not, according to their contention, upon taking possession of the works and plant after notice, become absolute owners of the tools and materials, &c.: this whole provision is to be regarded, not in the nature of a penalty, but as mere machinery for enabling the company to complete the works at the cost of R., and the company are bound to account for the value of the tools and materials in settling their accounts with him, which accounts were decreed to be taken on the footing of the contract.

As to one of the contracts, the company altered their intentions as to the direction which the line should take, and diverged, with the sanction of the landowners, to a greater extent than was permitted by their act of parliament; but the contractor never objected to the deviation, and continued to receive certificates and payment, in precisely the same mode as he would had the deviation not taken place :—

*Held*, that these circumstances did not vary this contract from the preceding contracts.

THIS was an appeal by William Ranger, a railway contractor, and a cross appeal by the Great Western Railway Company, from a decree of the late Vice-Chancellor of England, Sir L. Shadwell, dated the 13th July, 1844. The chief facts of the case are so fully and accurately stated in the Lord Chancellor's judgment, that it is quite unnecessary to add any thing to them.

Sir F. Kelly and R. Palmer, (with them Twells,) appeared for Ranger.

The Solicitor-General (Sir R. Bethell) and Stevens, for the Great Western Railway Company.

The following were some of the cases that were cited: *Jackson v. The Northwestern Railway Company*, 6 Railw. Cas. 120; *Kirk v. The Bromley Union*, 2 Ph. 640; s. c. 12 Jur. 85; *Cope v. The Thames Haven Dock and Railway Company*, 6 Railw. Cas. 83; *The Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Homersham v. The Wolverhampton Waterworks Company*, 6 Railw. Cas. 790; *Diggle v. The London and Blackwall Railway Company*, Id. 590; and *Dimes v. The Grand Junction Canal Company*, 17 Jur. 73; s. c. 16 Eng. Rep. 63.

*May 26, 1854.* LORD CHANCELLOR. This case was heard at great length in the last session of parliament. It was an appeal by the plaintiff against a decree of the late Vice-Chancellor of England, dated the 13th July, 1844, whereby his Honor gave to the appellant some relief, but not that to which he conceived himself entitled. There was also a cross appeal by the respondents, the Great Western Railway Company, claiming that the bills filed by the appellant ought to have been dismissed, with costs. Both appeals were heard together, and I now proceed to state to your lordships the course which I recommend your lordships to pursue. The pleadings are extremely long; and as a considerable time has elapsed since the case was argued, it may be convenient shortly to recall your lordships' attention to the nature of the case.

The appellant is a railway contractor, who was employed by the respondents in the years 1836, 1837, and 1838, to execute some extensive and important works, forming portions of the line of their railway. It appears that the respondents, when they set about making their line from Bristol to London, divided the whole distance into two portions; that beginning at Bristol, and proceeding eastward to Reading, was described as the Bristol or B line — that from Reading to London as the London or L line. The respondents were incorporated by an act of parliament passed in the year 1835, and in the following year the appellant entered into three different contracts with them for forming three several portions of the line of railway. The first contract bears date the 19th March, 1836, and was a contract for forming two miles and three quarters, beginning at or near the Bristol Docks, and running eastward to a particular field in the parish of Keynsham. The second contract is dated the 9th May, 1836, and was for a distance somewhat more than two miles, beginning at Keynsham, at the point where the other contract terminated, and running eastward. These two contracts were designated respectively as the 1 B contract and the 2 B contract. The third contract bears date the 30th August, 1836, and was for a portion of the line beginning at the Caversham road, near Reading, and running eastward for nearly six miles. The is called the S L contract. Besides the works thus designated, the appellant also executed some works to the westward of the 1 B contract, which are described as the 1 B extension works. The appellant, after the date of each of these three contracts, proceeded in the execution of the works to which they respectively related, and received large sums of money on account; but on the 2d July, 1838, the respondents took possession of all the works comprised in the 1 B and 2 B contracts, including the 1 B extension, and seized all the plant, tools, and materials thereon belonging to the appellant, alleging that he had made default in duly proceeding according to his engagements, and that they had, by express stipulations contained in the contracts, a right to seize the whole as forfeited. In this state of things the appellant, on the 21st July, 1838, filed his bill against the respondents and others, praying, amongst other things, that the respondents might be restrained by injunction from proceeding to complete the works of which they had so taken

possession. The bill was afterwards amended several times, and the object of it, so amended, was in effect to show, that, for reasons to which I will presently refer, the appellant must be considered to have been fraudulently led into signing the contracts; that, at all events, the respondents had, by their conduct in taking possession of the works, put an end to the contracts; and that he was entitled to be paid for what he had done, irrespective of the stipulations contained in them, as on a *quantum meruit*.

The prayer in the bill, as it was ultimately amended, did not ask for an injunction. The respondents, during the progress of the works, not only paid the appellant large sums of money on account, but also advanced to him sums to the amount of 28,000*l.* on mortgage of the plant and materials employed. The bill alleges, that at the time of these mortgages the respondents were really indebted to the appellant on account of the works he had executed, and it therefore insists on the right to charge the respondents with interest on the sums so due. The prayer of the bill, as ultimately amended, is in substance for a general account of what was due to the appellant, at fair prices, for the works he had executed, disregarding the contracts, and charging the respondents with interest on all sums due to him at the dates of the mortgages, and also charging them with the value of the plant and materials of which they had taken possession. On the 21st November, 1839, the respondents put in their answer, denying all the allegations of fraud, insisting on the contracts, and justifying their conduct in seizing the plant, tools, and materials, as being warranted by the express terms of the contracts.

Very soon after the filing of the original bill, namely, on the 10th August, 1838, the respondents seized and took possession of the appellant's stock and plant employed in the third or 8 L contract, claiming to be entitled so to do under its provisions, by reason of the neglect and misconduct of the appellant. From the time when the respondents thus got possession of the lines comprised in the three contracts, they proceeded to finish, and actually finished, the whole of the works themselves, and prevented the appellant from any further interference. On the 5th March, 1840, the appellant filed a bill of revivor and supplement, stating the seizure of the plant and materials on the line comprised in the 8 L contract, and praying, in substance, relief as to the works comprised in that contract, similar to that which he had in the first bill asked as to the other contracts. The respondents answered this bill on the 9th June, 1840. On the 15th September, 1841, the appellant filed another supplemental bill, alleging that, since the filing of the former bills, he had discovered errors in the accounts on which payments had been made to him, inasmuch as certain work which he had done under the three several contracts had been treated as common or coursed rubble masonry, whereas it was in fact Ashlar masonry, for which he was entitled to a much higher rate of payment than he had in fact received; and the bill prayed that in taking the accounts asked by the former bills this error might be rectified. The respondents answered this last bill on the 4th March, 1842.

Issue being joined, witnesses were examined on both sides, and a great deal of documentary evidence was put in, consisting chiefly of very numerous letters and notes which had passed between the appellant or his agents and the engineers and other servants of the company during the progress of the works. The causes were heard by the late Vice-Chancellor of England, who, on the 13th July, 1844, made the decree now appealed from. Before I proceed to call your lordships' attention to the grounds on which the appellant rests his title to relief, and to consider how far that title is well founded, it is necessary shortly to advert to the terms of the contracts. They are all nearly alike, and I will for the present confine myself to the first or 1 B contract, which, as I have already stated, bears date the 19th March, 1836. It is a deed under seal, made between the railway company of the one part and the appellant of the other part. It recites that a specification and plan of the 1 B portion of the line had been prepared by Mr. Brunel, the principal engineer of the company, and that the appellant had agreed to execute the works therein described according to the same; that a copy of the specification, with the appellant's tender to execute the works, was annexed to the contract, and that copies of the same had been signed by the appellant and Mr. Brunel, and were intended to be deposited in the office in Bristol; that the company had agreed to advance to the appellant, during the progress of the works, sums of money by way of instalments, according to the work from time to time done and certified by Mr. Brunel, and at their completion to pay him what should remain due; and that the appellant agreed to secure the due performance of his contract by a bond for 4,000*l.*, with two sureties, conditioned, amongst other things, for paying to the company, for every week's delay in the completion of the various enumerated portions of the works, certain stipulated sums, increasing as the delay increased.

It is then witnessed that the appellant covenanted with the company to execute the works according to the specification; that they should be commenced within ten days after notice by the engineer to commence, and should be completed within the time mentioned in the specification. There are then various engagements on the part of the appellant to conduct the works as the engineer should approve, the detail of which it is not important to consider. There is then a clause stipulating that if the appellant should become insolvent, or should from any cause not arising from the act of the company be delayed in completing the works, or should not proceed in the works to the satisfaction of the company, it should be lawful for the company to give notice in writing to the appellant, either under their common seal or under the hands of two directors, requiring him to proceed regularly with the works, and that in case, after such notice, he should for seven days make default in regularly proceeding, it should be lawful for the company to employ any other workmen, by contract, or by measure and value, or otherwise, to complete the works, and to pay for the same out of the money then due to the appellant, and that the payments then already made to him should be taken by him in full satisfaction of all his claims for work then

done; and that all the balance of moneys which would have become due to him, and all the tools and materials then on the ground for the purpose of the works, should become the absolute property of the company; and that if such balance and materials so to become the property of the company should be insufficient to cover the charges of the company, then the appellant should make good the deficiency.

There is then, after some other stipulations, a proviso, that all the works referred to in the specification as extra works which the engineer should require to be executed should be deemed to be included in the covenants entered into by the appellant, and should be paid for as thereafter mentioned; and further, that if the company should think fit to make any alteration in or additions to the said works, (including the extra works,) they might do so upon giving to the appellant written instructions for the purpose, signed by the engineer, and that the same should be paid for according to the schedule of prices signed by the appellant. There is then an agreement, that in case of any dispute between the appellant and the resident engineer, the appellant would abide by the decision of the principal engineer; and that if the appellant should be in any way delayed in the completion of the work by the act of the company, the principal engineer should determine whether any, and if any what, extension of time ought to be allowed. The deed then contains a covenant by the company to pay the appellant 63,028*l.* 16*s.* for the completion of the works, (exclusive of the extra works,) in manner following—that is to say, at the end of fourteen days from the commencement of the works, four fifths of the value of the work then executed, to be estimated by the principal engineer or his assistant resident engineer, having reference as well to the schedule of prices annexed to the tender as to the entire cost of the whole works, the execution of such works to be certified by the principal engineer; and so at the end of every fourteen days, until the one fifth retained should amount to 4,000*l.*, and thenceforth would pay the whole amount certified every fortnight, and at the end of the work would pay the whole 4,000*l.* retained as aforesaid—that is to say, 2,000*l.* at the end of one month, and 2,000*l.* at the end of a year from the final completion.

And it was further agreed that the company would pay for the extra work in the same manner, according to the schedule of prices: provided, nevertheless, that the appellant should not be entitled to receive any of the said payments until the works in respect of which they were to be made should have been certified by the principal engineer. It is then lastly agreed, that during the progress of the works the decision of the principal engineer, with respect to the amount, state, and condition of the work actually executed, and as to every other matter or thing relating thereto, should be final, and without appeal; but if any difference should arise between the company or their engineer and the appellant, after the completion of the contract, as to any matter of charge or account between the company and the appellant, then the same should be settled by arbitration, in the manner there pointed out. These are, I believe, the material parts of the contract or deed itself, which together with the specifica-

tion, containing, in great detail, a description of the works to be executed, is set out in the bill, and at the end of it is a copy of the tender which had been made by the appellant to do the works, together with the schedule of prices. The deed was executed as well by the company as the appellant.

The first ground on which the appellant rests his title to relief is, that he was induced to enter into the contract 1 B by the fraud of the company; that the sum at which he agreed to do the works was far below what he would have required, had he known the real nature of the soil through which the tunnels were to be made; but on this point he had been misled by the fraudulent contrivance of the respondents. The case made by the bill on this head is, that there being on the line of the road to be made for the railway in the neighborhood of Bristol three kinds of stone, sand stone, Dunns or Dunn stone, and Pennant or Hanham stone, of which the first (that is, sand stone) is comparatively soft and easy to work, whereas the other two kinds (particularly the latter) are hard and difficult to work, the company, acting through Mr. Brunel, their engineer, fraudulently contrived to make the appellant believe that the cuttings would be through the softer material, (sand stone,) and not through Dunns or Pennant stone, whereas the fact was, as they well knew, that the line was chiefly through the harder sorts of stone. The bill represents, that, for the purpose of enabling persons desirous of contracting to make the road along the line included in the contract described as 1 B, to tender for the same, it was necessary that in different parts of that portion of the intended line pits should be sunk, called "trial pits," in order that the nature of the strata might be previously known; and accordingly that the respondents did sink ten such pits, but that eight of them were only sunk to the depth of a few feet, and were, therefore, of little or no use in showing what would be the nature of the soil at the level of the line of the railway, which was at a very considerable depth below the surface; and the other two were sunk respectively to depths of 78 and 55 feet only, at points where the intended line of road was in one case 112 feet and in the other 97 feet below the surface, so that these two pits did not reach the level of the railway, in one case by 34 feet, and in the other by 42 feet. The bill further alleges that the soil dug out of all of the said pits was laid on the surface near the mouth, and showed apparently a sub-stratum of sand stone, the workmen employed to sink the pits having by directions from the company ceased to dig when they reached the hard stone, except that out of the bottom of one of the deep pits some Dunn stone was taken, but which had crumbled away when exposed to the air.

The bill then goes on to charge, in substance, that the company, with knowledge that the cuttings would have to be made through the harder sorts of stone, caused notice to be given by advertisement that they were ready to receive tenders according to certain printed forms circulated for the purpose, and the nature of the works to be done was to be ascertained from a specification deposited in their office at Bristol. The specification described the works for which the tender

was to be made. The printed form of tender contained an undertaking by the party tendering, not only that he would do the contract works at a specified sum, but also that he would do any extra works, and make any alterations in or additions to the original works which might be deemed expedient in the course of their progress, on being paid for the same according to certain rates set out in a schedule of prices annexed to the tender. The different heads under which charges were to be made by the contractor, in respect of such extra or altered works, were all printed as part of the form of tender, and the party tendering was to write against each such head the price at which he would agree to be bound to do the same works of the nature there referred to. Amongst the works so to be done was the excavating clay, shell, and sand stone, but there was no mention in the schedule of any other stone. Neither Dunn stone nor Pennant are referred to by name; and the suggestion of the bill is, that the omission of any mention of Dunn or Pennant stone was a contrivance, or part of a contrivance, for the purpose of leading the persons tendering, to suppose that they might make their calculations on the footing of there being no hard stone to be cut through — a supposition which would be confirmed by the trial pits, out of which no hard stone had been dug, except the small portion of Dunn stone from one of the pits, which, as I have already stated, crumbled away when exposed to the air.

The appellant was resident in London, and in order to enable him to make his tender, he sent down to Bristol an agent, Thomas Lloyd, whom he represents as a competent judge in such matters, to examine the line of the proposed works, so as to enable him to form a correct judgment as to what would be a fair amount to be tendered. The bill states that Lloyd accordingly proceeded to Bristol in the month of March, 1836, surveyed the line and inspected the trial pits, and that, reasonably supposing the two principal pits to have been sunk to the level, and not finding amongst the excavated material accumulated on the surface any thing but soft or loose stone—no Pennant or Hanham stone—he concluded that there would be no cutting through hard stone; and the sum tendered was calculated on that basis. It was, according to the bill, impossible for Lloyd to get down to or near the bottom of the two principal trial pits, in consequence of their being nearly filled up with rubbish and water before he examined them. The appellant, therefore, contends that he was imposed upon as to the nature of the work he had to perform, and so agreed to do it on terms to which, but for the deception practised on him, he would not have consented. The question on this part of the case is one of fact. Is it established that any imposition was practised on the appellant to induce him to enter into the contract? For if there was, he was clearly entitled to relief — whether precisely that which he asks for, is another question. Strictly speaking, a corporation cannot of itself be guilty of fraud; but where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that, if

they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation. The question, therefore, on this part of the case is, whether the directors or the engineers or agents whom they employed, were guilty of the fraudulent misrepresentations alleged by the bill. I am clearly of opinion that no such case is made out. [His lordship here stated the nature of the evidence on this point, and continued :]

Two engineers, Mr. Frere and Mr. Babbage, both say that the appellant had ample opportunity, by means of the trial pits and cuttings, of ascertaining the nature of the soil and strata; and the circumstances of the case satisfy me that this must be true. The work to be done was of a laborious, difficult, and expensive character. The notices calling for tenders had been circulated for many weeks, and even months, and would naturally excite the attention of contractors of eminence who would be drawn to the spot. I cannot attribute to the company the fraudulent intention imputed to them—an intention as absurd as it would have been fraudulent—of meaning to mislead those who should apply to make tenders for the work, when they must have felt that the success of such a fraud must entirely depend on the very improbable chance, that those who should be attracted by the notices would omit to make inquiry into the nature of the soil they would have to excavate. The work was not one of a trifling nature: one of the persons who made a tender demanded above 100,000*l*. The tenders were, in the first instance, to be made before the 1st March, 1836; and until nearly a fortnight after that date the two principal trial pits had been open, and free from water, so that there was nothing to prevent any contractor from himself ascertaining to what depth it had been cut, and what was the soil at the bottom; and though by the 12th March a great deal of water had entered, and so partially choked the two principal pits, yet Mr. Frere says the company and their engineers were always ready to facilitate the appellant's investigation as to the nature of the soil and strata.

The appellant, in his bill, assumes that sand stone and Pennant stone are two different kinds of stone; but this is not the conclusion at which, on the evidence, I arrive. "Pennant stone," says Mr. Brunel, "is a species of sand stone, and the only species in the neighborhood of Bristol, of sufficient hardness to be used for bridges, or other strong masonry; and Mr. Frere says that it is extensively used in Bristol, and is the hardest sort of sand stone found in that neighborhood, except the Brandon Hill stone. Dunn stone, according to the same witness, is merely a local term for a particular variety of shale, and is frequently found in cuttings along with sand stone. This explanation fully justifies the language of the tenders, without supposing that the materials to be excavated and removed were there mentioned by the company for any purpose of deception. The soil to be removed was sufficiently designated as consisting of clay, shale, and sand stone, the latter term comprehending all sand stone, hard as well as soft—that is, Pennant or Hanham stone, (which is in truth only

Pennant stone found at Hanham,) as well as ordinary sand stone. In the contract 2 B, the expression occurs, "compact gray sand stone, commonly called Hanham stone." It was for the appellant, before he made a tender, to satisfy himself as to the probable hardness of the sand stone to be removed, which, after all, could never be ascertained beforehand with perfect certainty. By examining the trial pits and cuttings, and making inquiries of the engineers, he might have ascertained the depths to which the pits had been sunk, and the nature of the soil through which they had penetrated, and at which they had arrived. The cuttings, according to the evidence of Mr. Frere, exhibited sand stone, Pennant and Dunn stone, and the old quarry in Fox's Wood showed Pennant.

In these circumstances, I think it is impossible to believe that there was any thing like contrivance to mislead the appellant or any other contractor; and it is clear that the appellant, if there was no fraud, was bound to satisfy himself on the subject; for the specification of the proposed works, submitted to him before the tender was made, expressly stipulates that the contractor must satisfy himself of the nature of the soil, and of all matters which can in any way influence his contract. This, though of course it would not absolve the company from the consequences of any fraudulent contrivances to mislead, yet certainly, in the absence of fraud, threw on the appellant the obligation of judging for himself. I must further add, that I cannot believe the appellant to have been really mistaken as to the nature of the soil, except possibly that the proportion of hard stone was greater than he had imagined he should find. I come to this conclusion from the fact, that the specification, which was submitted to him before he made the tender, provides for the construction of the Avon bridge, and other masonry, by means of the stone to be obtained from the cuttings. Now, Mr. Brunel says that Pennant is the only sand stone in the neighborhood of Bristol, of sufficient hardness to be used for masonry. The appellant either did know, or might have known this when he made his tender, and it is surely impossible for him, in the face of such a clause in the specification, to say that he did not know there would be any beds of Pennant stone — that is, of stone capable of being used for masonry — to be excavated or removed. It is not unworthy of observation that Mr. Stanton, one of the persons who made a tender, in his schedule of prices as to the sum which he would require for working sand stone, obviously points to the difference which might exist in the expense of removing sand stone of different qualities; and he did not, like the appellant and the other persons who made tenders, offer one fixed uniform sum for sand stone of every quality, but he required for moving &c. sand stone from open cuttings 1s. 4d. to 2s. 2d., and from tunnels 2s. 9d. to 4s. 6d.; from which I think it may fairly be inferred that he understood the words "sand stone" used in the schedule to include stone of different degrees of hardness — some more expensive to work, some less so. To all these considerations must be added, that the appellant did not, so far as there is any evidence on the subject, make any remonstrance as to the supposed deception or

mistake during the progress of the works, nor until after the relation between the parties had been entirely determined.

The bill, it is true, charges that the appellant did complain on this subject to Mr. Brunel, in the month of July, 1836; but Mr. Brunel says he has no recollection of such a complaint having been made; and the written correspondence, carried on during a period of two years, cannot be reconciled with the notion that the appellant considered himself to have been imposed upon, or that the works to be done were not mainly such as he had anticipated when he made his tender. On these grounds, I have come, without hesitation, to the conclusion that the appellant has failed to establish any title to relief under this head of fraud.

The next ground on which he rests his title to relief is, that Mr. Brunel, the principal engineer of the company, on whose decision many matters were, by the terms of the contract, made to depend, was incapacitated from acting in discharge of the duties imposed on him by reason of his being himself a shareholder of the company. The contract provided — [His lordship here read that part of the contract which he had before stated, relative to the duties and powers of the principal engineer, and proceeded:] It is not necessary to state the duties of the engineer more in detail; he was, in truth, made the absolute judge, during the progress of the works, of the mode in which the appellant was discharging his duties; he was to decide how much of the contract price of 63,028*l.* from time to time had become payable, and how much was due for extra works, and from his decision there was no appeal, except that, after all should have been completed, the appellant might call in a referee of his own as to any question as to the amount, if any, then due beyond what had been certified.

The complaint made by the appellant is, that the duties thus confided to the principal engineer were of a judicial nature; that Mr. Brunel was the principal engineer by whom these duties were to be performed, and that he himself was a shareholder in the company; that he was thus made a judge or arbitrator in what was, in effect, his own cause; that until the month of July, 1838, the appellant was unaware of the fact of Mr. Brunel having an interest in the company except as their engineer, and so ought not to be bound by any of his decisions. This branch of the appellant's argument rests on the principle discussed in this house in the case of *Dimes v. The Grand Junction Canal Company*, 17 Jur. 73, s. c. 16 Eng. Rep. 63, in which your lordships agreed, or apparently agreed, with the able opinion delivered by the learned judges, through Parke, B., that the decision of a judge made in a cause in which he has an interest is voidable, unless in a case of necessity, as where an action was brought against all the judges of the Court of Common Pleas on a matter on which they had exclusive jurisdiction. I say "agreed, or apparently agreed," for the point did not, in the result, actually call for the decision of the house. I shall, however, assume that to be (as I believe it is) the law. But the question is, whether it governs the present case. I think the principle has no application here. A judge ought to be,

and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias, inducing him to lean to the one rather than to the other. In ordinary cases, it is a just ground of exception to a judge that he is not indifferent; and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent. But here the whole tenor of the contract shows that it was never intended that the engineer should be indifferent between the parties.

When it is stipulated that certain questions shall be decided by the engineer appointed by the company, that is, in fact, a stipulation that they shall be decided by the company. It is obvious that there never was any intention of leaving to third persons the decision of questions arising during the progress of the works. The company reserved the decision for itself, acting, however, as from the nature of things it must act, by an agent, and that agent was, for this purpose, the engineer. His decisions were, in fact, their decisions. The contract did not hold out, or pretend to hold out, to the appellant that he was to look to the engineer in any other character than as the impersonation of the company. In fact, the contract treats his acts and their acts, for many purposes as equivalent, or rather identical. I am, therefore, of opinion that the principle on which the doctrines as to a judge rest, wholly fails in its application to this case. The company's engineer was not intended to be an impartial judge, but the organ of one of the contracting parties. The company stipulated that their engineer for the time being, whosoever he might be, should be the person to decide disputes pending the progress of the works, and the appellant, by assenting to that stipulation, put it out of his power to object, on the ground of what has been called the "unindifferency" of the person by whose decision he agreed to be bound. It is to be observed, that the person to decide was not a particular individual, in whom, notwithstanding his relation to the company, the contractor might have so much confidence as to agree to be bound by his awards, but any one from time to time the company might choose to select as their engineer. The appellant alleges that he did not know the fact that Mr. Brunel was a shareholder until more than two years after the works had been begun.

But he must have known that the company had it in their power to appoint another engineer in Mr. Brunel's place, who might hold shares, or that Mr. Brunel himself might purchase shares. Without the intervention of the engineer the contract was, as it were, paralyzed; nothing could be done under it; and it surely can hardly be argued that a person appointed engineer could, by purchasing shares, render the contract practically inoperative. His Honor the Vice-Chancellor of England, when this case was before him, treated it as matter of notoriety that engineers employed in forming the line of an intended railway were almost universally holders of shares. Without going that length, it may be safely affirmed that there is nothing to prevent them from purchasing shares; this must have been known to the appellant; and unless, therefore, he can read the word "engineer" in

the contract as meaning, by necessary implication, an engineer not holding shares in the intended company, or can import into the contract an agreement on the part of the company that no person holding shares should ever be appointed to fill, or should continue to fill, the character of engineer, he must be bound by the terms of his own agreement. This, therefore, brings us to the question, whether, independently of these two heads of fraud, the appellant has shown a title to relief. His object is to obtain payment for work done by him for the company under the several contracts to which I have already referred. Now, *prima facie*, the payment ought to be sought, not through the medium of a suit in equity, but by an action at law. The right of the appellant is strictly a legal right—the obligation of the company is a mere legal obligation.

The question, therefore, is, whether there is any thing to transfer, in this case, the jurisdiction from a court of law to a court of equity—whether the nature of the works to be executed, or the conduct of the parties during their progress, has given to the appellant a right to sue in equity instead of at law, which, in the case of any ordinary contract to do work for another, would not have existed. In considering this question, I will, in the first instance, confine the inquiry to the first contract, that designated as the contract 1 B. What, then, were the appellant's rights under that contract? He had a right, in executing the works comprised in that contract, to recover from the company the sum of 63,028*l.* 16*s.*, and also to be paid, according to the rates specified in the schedule, for all extra works. He was not to wait for payment till the whole should be finished, but he was to be paid at the end of every fourteen days the value of the work then actually completed, the company deducting one fifth of the amount until the deduction should amount to 4,000*l.* This 4,000*l.* was to be retained by the company, by way of caution or security, till the whole work should be finished. The value of the work done at the end of every fourteen days was to be estimated by the engineer of the company, and payment was to be made on his certificate, which during the progress of the work was to be conclusive; but on the completion of the whole, any dispute as to any matter of account between the appellant and the company was to be settled by arbitration. In ascertaining the amount of every fortnight's certificate, the engineer was to have reference as well to the schedule of prices annexed to the contract as to the entire cost of the whole works.

This provision was obviously necessary; for some parts of the work, and those of an expensive nature, such as the driving of headways through the tunnels and the formation of coffer-dams, are not mentioned in the schedule of prices, though constituting an important part of the work as described in the specification, and though their cost, according to the appellant's exhibit, (200,) formed (as, indeed, it must have formed) an important element in his calculations, which led him to make his tender to do the works for a sum of 63,028*l.* 16*s.* The precise principle on which the engineer, in making his fortnightly certificates, was to blend together in his cal-

culations the value of the works done, as deducible from the schedule of prices, and from the costs of the whole works, is certainly not clearly explained. In making such an estimate it could hardly be expected that any one would arrive at a result perfectly accurate. But as the payments to be made on these certificates were only payments on account, extreme accuracy was not essential. Both parties seem to have agreed in leaving to the engineer to frame the certificates as fairly as he could, so that the work done might as far as possible be paid for as it proceeded, the stipulated deduction of 4,000*l.* being kept back till the final completion. This, then, being the right of the appellant, the case he makes by his bill is, that from the very outset the sums certified were greatly below what they ought to have been; that this kept him very deficient in funds, so that he was unable to prosecute the works with the same vigour with which he might have proceeded if he had not been thus unduly straitened for want of money.

In these circumstances, he contends that he is entitled to have an account taken of the work actually done, according to what the certificates ought to have been; that the respondents are not at liberty to insist on any penalties for the failure in completing the different portions of the works at the stipulated times; and, moreover, that they were not at liberty to seize and take possession of the plant as forfeited by reason of undue delay in prosecuting the works. With respect to the certificates for the work done during the first seven or eight months—that is, from the 29th March, 1836, the date of the contract, up to the beginning of the following month of November—the course pointed out by the contract was not followed. For the first three months the certificates made out by Mr. Brunel, according to the reports of Mr. Frere, the resident engineer, were calculated solely on so much of the work done as ranged itself strictly under the head of the schedule of prices—that is, on the excavations, and removing soil, and a small portion of masonry—whereas a great part of the work actually done was work to which the schedule was inapplicable, such as the driving of headings and the forming of coffer-dams. Besides which, the certificates, instead of being made out every fortnight, were only made out at long intervals, there having been only four up to the end of June, being a period of between three and four months. The last of the certificates so made out was for the sum of 286*l.* 1*s.*, being for the work done from the 11th to the 25th June. It bears date the first July, and gave rise to a letter of remonstrance from the appellant to Mr. Brunel, dated the 5th July, in which he complains of the principle on which the certificates were framed; that they took no account of any expenditure or works except those capable of being exactly calculated by reference to the schedule of prices; and he pointed out, that as a large portion of the works, amounting to 23,500*l.* and upwards, had no reference to those prices, if the system then adopted was persevered in, the consequence would be, that instead of receiving payment during the progress of the works of the whole 63,028*l.*, less the

4000*l.* retained as caution money, he would not have been paid that sum by above 23,500*l.*

The evidence shows, that from the very commencement of the works the appellant was considered by the engineers to be proceeding in a dilatory and unsatisfactory manner, and they made repeated remonstrances on the subject, urging him to greater diligence and expedition. I do not stop to inquire whether these objections were well founded in fact; they were made, and were relied on by the engineers as explaining and justifying the apparently small amount of the certificates. The consequence of the appellant's appeal to Mr. Brunel was, that they met at Bristol on or about the 20th July, and on that occasion an arrangement was come to between them, that until the headings should have been completely driven through the three tunnels, no further certificates should be given; but that, if the appellant should proceed to get these headways completed, using what Mr. Brunel should consider to be due energy and vigor for the purpose, he would recommend the company to advance money from time to time, on account of the certificate to be given, as soon as the headways should have been completed. Mr. Brunel states, in his evidence, that the appellant readily acquiesced in this arrangement, and all his letters confirm that statement. The result of what had passed was, that the appellant did proceed with increased vigor, and got the headings through the last of the three tunnels on the 4th November. In the course of the work, beginning on the 22d July and ending on the 9th November, the respondents did, pursuant to Mr. Brunel's engagement, make advances to the appellant to the amount, in the whole, of 18,400*l.*; and, on the 11th November, a certificate was made, and signed by Mr. Brunel, of all the work then done, not comprised in the former certificates, showing a balance (after retaining 4,000*l.*) of 19,868*l.* due to the appellant, against which was to be set the 18,400*l.* already advanced on account, and the balance, 1,468*l.*, was remitted by Chapman, the secretary of the company, to the appellant, with an explanatory paper, showing how the balance had been arrived at, and with a request that the appellant would examine it, and, if satisfied with its accuracy, would acknowledge it. Chapman's letter was dated on the 17th November, and on the 22d the appellant acknowledged its receipt, with the 1,468*l.* He made no observations as to its accuracy, of which, therefore, it must be presumed he was satisfied, as it had been some days before him.

Indeed, at this point of time, I do not think there was much difference between the estimate as made by Mr. Brunel and that made by the appellant himself. The value of the work, as calculated and allowed to the appellant on the five certificates, up to the 12th November, was 26,819*l.* On the 2d November, the appellant sent to Mr. Brunel a paper containing a detailed view of the costs of the works up to the preceding Saturday, the 29th October, with reference to the gross amount of the contract, as well as the schedule of prices, and he thereby represents that there was due to him, for work then done on account of the contract, exclusive of extra work, 27,802*l.*, being not quite 1,000*l.* more than was shown by the certificate of the

11th November. In calculating the sum of 27,802*l.*, the appellant takes credit for the whole of the headings as having been completed, whereas, according to Mr. Brunel, 629 yards of heading were not cleared, and so not completed, for some weeks afterwards; and on this head alone there would be a sum of 3,145*l.* included in the 27,802*l.* claimed by the appellant as due on the 29th October, which was not allowed to him by Mr. Brunel in the certificate of the 11th November, but which was included by him in the two next succeeding certificates. It does not, however, appear to me to be necessary to institute any minute inquiry as to how far the calculations of Mr. Brunel were accurate. I think it is quite enough if they were made *bonâ fide*, and with the intention of acting according to the exigency of the terms of the contract. The company expressly stipulated, that during the progress of the work the decision of the engineer as to the value of the work, from time to time executed, should be final. If the appellant thought this a harsh or oppressive clause, he ought not to have agreed to it. It does not, however, seem to me to have been unreasonable. In the absence of express stipulation, a person contracting to do any work for another, is not entitled to demand payment till the whole has been completed.

The nature and extent of such a work as that which the appellant was to perform, might well induce a modification of what, in the absence of express contract, would have been the right of the parties. But, at the same time, the company might reasonably feel, that the extent to which any claim for payment during the progress of the works should be confined on the part of the contractor must be left, in a great measure, to themselves. It would never do for persons in the situation of these respondents to put themselves in a position in which a question might be raised with them adversely every fortnight as to the extent of their immediate liability to their contractors. If, indeed, there was any thing like fraud or unfairness in the case, different considerations might arise; but the evidence wholly fails to establish any thing of the sort. I can discover no trace of any desire not to certify fully and fairly the amount due. It may be that in some instances the certificate ought to have been for a higher sum than that for which it was actually given, though no specific instance of the sort has been shown to my satisfaction. The learned counsel for the appellant pointed out that, according to the schedule of prices, he was to be allowed, in respect of the removal of materials, 9*d.* for each mile additional, but above one quarter of a mile, the certificates allowed in general only 1*d.*, 2*d.*, and 3*d.* This may have been an error, but I am by no means satisfied that it was an error against the appellant; I rather infer, from the mode in which the allowance was made, that the engineer, when the distance over which the materials were led, exceeded a quarter of a mile, allowed an additional sum, at the rate of 9*d.* a mile, even though there was not an excess of a whole mile. [His lordship here stated the circumstances which led him to this conclusion, and proceeded:]

There is no other mode of explaining the different rates often allowed in the same certificate. This was a benefit to the appellant,

to which he certainly had no claim under the contract, for the contract gave him nothing unless the additional distance extended to a whole mile. I have adverted to this point because some stress was laid on it in argument, but my judgment is in no respect founded on it. The appellant, in the absence of fraud, was, during the progress of the works, bound by the certificates of the engineer. It may be right I should add, that there was, as it appears to me, great force in the objection made by the appellant in his letter to Mr. Brunel of the 5th July, 1836, to which I have already referred, as to the defective principle on which up to that time Mr. Frere had calculated the value of the work done. But this was clearly set right by the fifth certificate and the intermediate arrangement for advances of money, to which I am satisfied, on the evidence, the appellant had readily assented. Two of the appellant's witnesses, Ross and Buckwell, say that the certificates were very deficient, and did not fairly represent the work actually done. This is denied by Brunel, Frere, and Babage. It is true, that Ross mentions some instances in which he alleged that the certificates were deficient; but, as there is no charge in the bill of any specific error, it was impossible for the respondents to meet that evidence; and, on the whole, I think that the appellant has entirely failed to make out that the certificates were not such as he was entitled to have under the provisions of the contract. Supposing, then, that the certificates were such as the respondents were bound to furnish, the next question is, whether, in paying to the appellant the amounts so from time to time certified, the respondents were entitled to deduct the amounts due or claimed to be due for penalties. Such deductions were made on two occasions: first, on the certificate given on the 12th November, 1836, when the headings through the tunnels were completed; and, secondly, on the 3d July, 1837.

On the first of those occasions a sum of 200*l.* was deducted, being five penalties alleged to be due for delay in completing the headways through tunnels No. 1 and No. 3 at the specified time; and on the second occasion a deduction of 20*l.* was made as a penalty for delay in the works at the Avon bridge. These penalties had certainly, according to the express language of the deed, been incurred, and therefore the point for decision is, whether there was any thing, either in the nature of the penalty or the conduct of the parties, to prevent the company from insisting on the literal terms of the contract. There is no doubt that when the doing of any particular act is secured by a penalty, a court of equity in general is anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, and not as a sum of money really intended to be paid. On the other hand, it is certainly open to parties who are entering into contracts to stipulate, that on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation. Whether a sum so fixed is to be considered as merely in the nature of a security for the actual amount of damage incurred, or as an agreed amount of liquidated damages, is often a question of great nicety and difficulty. I am not sure that

benefit has, on the whole, resulted from the struggle which courts, both at law and in equity, have made to relieve contracting parties from payments which they have bound themselves to make by way of penalty; such a course may have been very reasonable and useful where the damage resulting from the violation of the contract is capable of being exactly measured; but whenever the *quantum* of damage is in its nature uncertain, and the due performance of it has been secured, or purports to have been secured, by a penalty, it might perhaps have been safer and more convenient to have always understood the parties as meaning what their language imports, namely, that on failure to perform the contract the stipulated penalty should be paid. But this has not always been the doctrine of the courts.

The distinction between a penalty, and a sum fixed as the conventional amount of damage, is too well established to be now called in question, however difficult it may be to say, in any particular case, under which head the stipulation is to be classed. I shall presently have occasion to state that the sums in this contract, made payable under the name of penalties, are to be treated as liquidated damages, and not as penalties to secure something unliquidated. For the present, it is sufficient to say that it certainly was not necessary, for the purpose of raising a question on this point, to file a bill in equity. The question only arises on two certificates. If the appellant considered that the company had no right to deduct the penalties, he had only to bring an action on the certificates, and (independently of the question arising from the conduct of the parties) the point would necessarily have arisen, and been decided at law. The bill cannot, I think, possibly be sustained on the mere ground that the penalties deducted were not intended as more than a mode of securing to the respondents adequate compensation for the damage arising from the appellant's delay. But then it was argued, that even supposing the penalties are to be treated as sums actually intended to be recoverable, still, the conduct of the respondents and of Mr. Brunel, their agent, was such as to preclude them, at all events, so far as relates to the 200*l.* deducted in November, 1836, from insisting on the penalties, whether they are to be treated as sums actually due, or as a mere security for unascertained damage.

Mr. Brunel, it was argued, by the arrangement already referred to, made with the appellant on the 20th July, 1836, agreed to give him an extension of time for perfecting the headings through the tunnels, and as they were all finished before the end of the extended time, it cannot now be allowed to the company to insist on any penalties for their non-completion at the time originally contemplated. It is not necessary to discuss the question as to the power of Mr. Brunel to vary the rights of the respondents under the contract by any such arrangement as has been suggested, because I am clearly of opinion that no such agreement as that suggested was, in fact, made. Mr. Brunel found the appellant greatly behind with his works, and thought — whether rightly or not is immaterial — that he ought not to sign any more certificates until the headings had been completed. He thought, however, that in spite of the backward state of the works,

the headings might be perfected before certain specified days, if the appellant would proceed with greatly increased vigour and diligence; and what he agreed was, that if the appellant would increase his exertions, so as to secure his completing the headings before certain specified days, he would, though he did not feel warranted in signing certificates, induce the respondents to advance large sums on account, so as in effect to give the appellant the same benefit which he would have had if certificates had been given. To this arrangement the appellant acceded. It clearly did not imply necessarily that the rights of the company, arising out of the failure to do the particular portion of the work by the days originally agreed on, should be affected; and that the appellant did not understand it as having any such meaning must, I think, be inferred from the fact that he accepted payment with notice of the deduction, and made no objection, though, in effect, he was invited by Mr. Chapman so to do if he was dissatisfied. Mr. Brunel, in answer to the fifteenth interrogatory, denies that he ever stated that any penalties would not be enforced; and I am satisfied of the truth of what he so states. This deduction of penalties, therefore, does not appear to me to afford any ground for sustaining the bill.

Being, therefore, of opinion that the appellant has failed to establish any title to equitable relief, grounded either on the alleged insufficiency of the sums certified, or of the deductions made for penalties, I come next to consider whether he has made any case for equitable relief by reason of the course taken by the respondents in taking possession of the works on the 2d July, 1838. The appellant says that he was proceeding duly to complete the works according to the terms of the contract, when, on the 2d July, 1838, the respondents wrongfully took possession of all his stock of materials, tools, and implements, turned him off from the ground, and took the completion of the works into their own hands. This the appellant contends was in effect an abandonment or a repudiation of the contract; so that, without reference to the agreed sum of 63,028*l.*, he is entitled to have an account taken of the work actually done, and of the machinery, tools, materials, &c., taken possession of by the respondents. I do not think that even if the appellant had made out what he contends for, namely, that in taking possession of the works the respondents were guilty of a wrongful act, and that they did what the contract did not authorize them to do, the consequence would have been to entitle the appellant to the relief which he asks.

If, while he was duly proceeding to fulfil his contract, he was wrongfully impeded by the respondents, and by them prevented from doing what he had undertaken to do, they would be answerable to him in damages for all the consequences of their wrongful act; such damages would, of course, be in part calculated on the value of the plant and other articles of which he had been wrongfully deprived, but the effect would not be to alter the relative position of the parties as to the contract itself, and to entitle the appellant to say there had been no contract, or that he was to be paid for what he had done without reference to the contract. That would not be the consequence of

the act of the respondents, even, treating it as wrongful. The right of the appellant would be to recover such an amount of damages as would put him as nearly as possible in the same position as if no such wrong had been committed, that is, not as if there had been no contract, but as if he had been allowed to complete the contract without interruption. This was his legal right, and I can discover nothing entitling him to any relief beyond that resulting from the enforcing of that right, nothing which can enable him to convert a wrongful act, which entitled him to damages, into an act which entitled him to an account of work already done, to be taken on terms different from those for which he had contracted.

I have hitherto assumed that the company, in taking possession of the works, were guilty of a wrongful act, that they did something not warranted by the contract. But this is not admitted by them; they contend that what they did was warranted by the contract, and so that the appellant has no cause of complaint whatever, at law or in equity. This question is one partly of law and partly of fact, and it turns on the following clause of the deed: "And further, that in case the said William Ranger shall become insolvent, or be declared bankrupt, or shall from any cause whatsoever, other than any arising from the act of the said company, their engineer or authorized agents, be prevented from or delayed in proceeding with and completing the said works according to this present contract, or shall not commence, or proceed in the said works to the satisfaction of the said company, it shall be lawful to and for the said company, if they shall think fit, to give, or cause to be given, or left with, or at the usual place of abode of the said William Ranger, or his sureties, any or either of them, a notice in writing, either under the common seal of the said company, or signed by two of the directors thereof, requiring him, the said William Ranger, to enter upon and commence and regularly proceed with the said works; and that in case the said William Ranger shall, for seven days after such notice given or left, make default in commencing, or regularly proceeding with the said works, it shall and may be lawful to and for the said company to employ any other respectable workman, or workmen, either by contract, or measure and value, or otherwise, to proceed with the said works, and to complete the same, and pay, or cause to be paid to the said workman or workmen the amount of his, or their charges for the same, and for all necessary materials, utensils, engines, and machinery to be found and provided for such completion, out of the money which shall then be remaining due to the said William Ranger on account of this contract. And further, that the moneys which previously to such default shall have been paid to the said William Ranger on account of any work, or materials then already done, or executed, or provided by the said William Ranger, shall be considered as the full value, and taken by the said William Ranger in full payment and satisfaction, not only of and for the said work in respect of which payment may have been made, but likewise of and for any other work and materials which the said William Ranger shall have done, executed, or provided, although no such payments may have been previously made in respect thereof.

And further, that all the balance and moneys whatsoever which then, or thereafter would have been, or become due, or payable to the said William Ranger under this contract if this present clause had not been inserted, together with all the tools and materials then delivered for the purpose of the works hereby contracted for, and then being upon or about the site of the said works, shall upon such default as aforesaid become and be in all respects considered as the absolute property of the said company. And further, that if the said balance, moneys, and materials so to become the property of the said company as last aforesaid shall be insufficient to cover such charges for workmen and materials as are hereinbefore lastly directed to be paid thereout, and also the charges and expenses of keeping such works in repair for the space of one year after the completion thereof, then the said William Ranger, his heirs, executors, and administrators, shall and will make good and pay to the said company such deficiency on demand." The first point to be decided on this clause is one of law.

What is the construction of this contract? In what circumstances would the company have a right under the contract to take possession of the appellant's tools and materials, and to complete the works themselves? That a state of circumstances might arise giving to them such a right is a matter of no doubt. If, for instance, the appellant had deserted the works in order to prosecute some more profitable engagement elsewhere, there can be no doubt that in such a case the right of the respondents, stipulated for by the clause in question, would have arisen. How, then, was it to be decided whether such a right had or had not arisen? This can only be answered by attending to the precise terms of the clause. The provision is, that if the appellant shall not proceed with the works to the satisfaction of the company, they may give him notice in writing, calling on him to proceed regularly; and then, if he shall for seven days make default in regularly proceeding with the works, the company may employ other workmen, and act on the clause in question. The company might give the notice if they were dissatisfied, reasonably or unreasonably, with the appellant's rate of progress or mode of proceeding. They were the sole judges of the necessity for, or expediency of, giving such a notice. Their dissatisfaction with the rate, or mode of proceeding was a sufficient reason for such a notice. But when the notice was given, their right to act on it depended, not on their view of the appellant's conduct, not on the question whether they were, or were not satisfied with him, but on the fact whether, after receipt of the notice, he did or did not for seven days make default in regularly proceeding with the works. This being the nature of the right, the question becomes one of fact.

The respondents having given the notice required by the deed, was the appellant's conduct, after receipt of the notice, such as to justify the respondents in what they did? They must, in order to sustain the validity of their acts, establish, as a matter of fact, that the appellant did, for seven days after receipt of the notice, make default in proceeding regularly, which, I take it, means proceeding with reason-

able skill and diligence in the prosecution of the works. The only evidence directly bearing on this question is that contained in Mr. Brunel's answers to the seventeenth, eighteenth, and twenty-first interrogatories. The answer to the seventeenth is insufficient for two reasons — first, it speaks only of the proceeding prior, and not of that subsequent, to the date of the notice; and, secondly, it does not say that even before that date there was any default, so far as related to the contract 1 B. The words of Mr. Brunel, in the deposition, are, "The works under the contract 1 B, 2 B, and 1 B extension, were not proceeded with regularly, or to my satisfaction." This is consistent with there never having been any want of due and regular proceeding, so far as contract 1 B is concerned. The contracts 1 B, 2 B, and 1 B extension, being all connected by the copulative "and," it might be, so far as any thing can be deduced from this evidence, that the only want of regularity was in the contract 2 B, and that all the rest of the works had proceeded regularly, and to Mr. Brunel's entire satisfaction.

This evidence, therefore, was perhaps insufficient to warrant the respondents in the course they took. But the answer to the eighteenth interrogatory is not open to the same objection. Mr. Brunel there states expressly that the appellant did not, after the receipt of the notice, proceed regularly with the works of 1 B extension; and being of opinion, as I shall presently have occasion to state, that the works of 1 B extension did not form the subject of a separate contract, but are to be considered only as a part of the original 1 B contract, his evidence goes expressly to the point, that after the notice given by the respondents on the 23d June, 1836, there was such a default on the part of the appellant as entitled them to act on the clause of the contract now under consideration. That Mr. Brunel was not speaking unadvisedly in this evidence, is plain, from what he states afterwards, in answer to the twenty-first interrogatory. He there says, that at the time when the company took possession of the works he was perfectly well acquainted with their state and condition, and with the degree of progress made therein; and he says, that "in his judgment it was quite necessary they should be taken out of the appellant's hands, in order to insure their completion." My strong impression, on the evidence as it stands, is in conformity with this testimony. It is not, however, necessary to decide whether this is so clear as to preclude the necessity for further inquiry; for even if any inference on this point is not just — if, in fact, there was no such default as warranted the course taken by the company, still, the result was only to confer on the appellant a right of action to recover damages for the wrong inflicted on him, not a right to treat himself as absolved from the contract, and as entitled to be paid for the works he had done as if it had never existed. So far, therefore, as relates to this first contract — that is, the contract 1 B — the appellant has failed to show any title to the relief which he asks, being, in substance, a right to payment for the work done, irrespective of the contract.

The next contract, in point of time, entered into by the appellant

was designated in the pleadings as contract 2 B; but I think it more convenient, before I refer to that contract, to dispose of that which is described as 1 B extension. This was not a contract under seal, and therefore, if it were really to be treated as an independent agreement, there might be some difficulty in determining the precise nature and extent of the respondents' liabilities under it. They might contend that, as a corporation, they are not liable on a parol contract; but I do not think that any question of that sort arises, for the contract 1 B extension seems to me, on the evidence, to be, in fact, only a part of the original 1 B contract; or, at all events, that as between the appellant and respondents, it must be taken to be part of that which the appellant was bound to execute under the description of extra works, or of additions to the original works, subject only to certain alterations of price. [His lordship then went into the circumstances relating to the 1 B extension contract, showing that it was, in fact, but a part of the 1 B contract; and after applying the same reasoning to this contract that he had to the previous one, he concluded that part of the case by saying:] On these grounds I think that the appellant's claim to the relief which he asks, so far as relates to the extension contract, is as groundless as that in respect to the original contract. In both cases, he has alike failed to establish what he contends for, namely, a title to be paid as if no contract had existed.

This brings me to the consideration of the second contract—that called the 2 B contract. This, as I have already stated, was a contract to execute the works on the part of the line beginning at the eastern extremity of the contract 1 B, extending from thence in an easterly direction for between two and three miles. This second contract was in its terms the same as the contract 1 B, or nearly so. Certificates were to be given every fortnight by the engineer; a sum of 4,000*l.* was to be deducted and retained, by stopping 20*l.* per cent. on the certificates till the amount so deducted should reach 4,000*l.*; and the company had the same power, after notice, to seize the stock and plant, and complete the works themselves, which they had under the first contract. Certificates were, in fact, given every fortnight, and the amount certified was regularly paid. The notice of the 23d June, 1838, applied to this as well as to the other contract; and the company on the 2d July took possession of the appellant's stock and plant on both portions of the line, and completed the works themselves.

All the reasons on which I have relied as showing that there is nothing entitling the appellant to the relief he asks in respect of the contract 1 B apply also to this second contract, except, indeed, that the evidence does not appear to make out, without inquiry, that he did not proceed regularly—that is, with due skill and diligence—after the receipt of the notice. I think Mr. Brunel must have meant to state this by his answer to the twenty-first interrogatory. But if the appellant's title to the relief he asks had turned on the point whether the respondents had or had not established such default in evidence, I certainly should have thought it not made out—at all

events, not so made out as to preclude the necessity for inquiry. But I have already stated, that even if there was no default, and so the conduct of the respondents was wrongful, yet that did not give to the appellant the right of treating as he would wish the contract to be treated, namely, having been void *ab initio*. His remedy was by an action to recover compensation in damages, in which the question, whether any wrong had been inflicted, and if so, to what extent he had been damaged, would properly have arisen. I do not think it necessary, therefore, to say more on the subject of this second contract. The only remaining contract is that designated as 8 L, or the Reading contract. This contract bears date the 30th August, 1836, being between five and six months after the date of the first or 1 B contract, and nearly four months after the date of the second or 2 B contract. The portion of the line to which it relates is a distance of about six miles from the Caversham road, at or near Reading, eastwards towards London. The sum to be paid by the company to the plaintiff was 186,344l.

The contract is framed substantially on the same principle as the two preceding contracts: it contains the same provisions for payments to be made every fortnight on the certificate of the engineer, whose decision was during the progress of the works to be final, though subject to revision when the whole work should be completed. There is also a provision for enabling the company, in case the appellant should not proceed to the satisfaction of the engineer, to take possession of the plant, and to oust him from the further prosecution of the works, similar in all respects to that contained in the other contracts. Before any of the works connected with this contract were commenced, the company resolved to make a deviation from the line as laid down in the specification and the plan sanctioned by the acts of parliament. The deviation consisted in carrying the line for the first two miles and three quarters from the Caversham road eastward, a little to the south of the line originally intended. At one part of the line the deviation was as much as 220 yards; at other parts the lines ran close to each other. It seems that before the month of November, 1836, the company had made an arrangement with the land-owners, under which they obtained possession of the land necessary for their altered line, and they put the appellant into possession of this land, and gave him the requisite notice to proceed. He accordingly began the works on the 10th November, 1836. The deviated line was thenceforth proceeded with as being the parliamentary line, though, in fact, the deviation did not obtain the sanction of the legislature till the following month of July.

The first point made by the appellant as to this part of the works is, that he is not bound, in reference to them, by the contract 8 L, inasmuch as that contract related, not to the line actually proceeded with, but to a different line, the execution of which was eventually abandoned. But for this argument, I cannot discover the slightest foundation. By the express terms of the contract, the company were authorized to make any alteration in the works contracted for which

they might deem expedient, and I cannot conceive any thing more legitimately coming within the meaning of an alteration than the carrying of the line one or two hundred yards to the south, avoiding thereby the necessity of a tunnel. Mr. Brunel says expressly, that for a great portion of the distance, the new line passed through the very same field as the line originally contemplated; that the soil (so far as he is aware) was the same; that no new drawings or plans were necessary, those made for the original line, as described in the specification, being perfectly applicable to the substituted line; and he adds, that it was distinctly agreed between him and the appellant that the contract should remain applicable to so much of the old line as was not abandoned, and should be applied, so far as might be, to the new line. That this was the understanding of the appellant is manifest, not only from the fact that he never made a suggestion to the contrary, but further, because he regularly received his fortnightly certificates, with the reduction of 20*l.* per cent. till the sum retained amounted to 4,000*l.*, an arrangement depending solely on the contract. This part of the case does not appear to me to admit of the slightest doubt. Taking it, then, as clear that the appellant was proceeding in the Reading works, under the contract 8 L, I have next to consider what was done, and what rights the appellant and the company acquired. The appellant, having begun these works in November, 1836, proceeded with them, and received regular certificates and payments thereon every fortnight. This continued up to the month of April, 1838, on the 6th day of which month a notice, signed by one of the secretaries of the company, was served on him, calling on him to proceed regularly with the works, and warning him that, if he neglected to do so, the company would exercise the powers conferred on them by the contract.

This notice led to an arrangement, according to which the appellant agreed to give up to the company the prosecution of that portion of the works which was to be executed at Ruscombe, being at the eastern extremity of the line, and he promised to push forward the other portions of his work with increased vigor. The appellant suggests that he was coerced by the company, and compelled to acquiesce in this arrangement. There is, however, no proof of this. It is denied by the company, and is not supported by any evidence. It is, therefore, impossible to pay any regard to this allegation. The appellant continued to proceed with that portion of the work not given up to the company, but in or before the month of June, 1838, he appears to have become involved in pecuniary difficulties to such an extent that the management of his affairs was put into the hands of his creditors. A correspondence took place between Mr. Lumley, the solicitor for the creditors, and the secretary of the company, in which Mr. Lumley complained of the mode in which the certificates on the 8 L contract were made out. He alleged that the price at which the work done by the appellant was estimated was below that contained in the schedule of prices annexed to the contract, and that the appellant had, in consequence of this variation from the scheduled prices, received less by 11,000*l.* than he ought to have received. The answer

given on the part of the company was, that, in calculating the sums to be paid from time to time, the engineer was bound to take into account not only the scheduled prices, but also the whole sum payable under the contract for the work remaining to be done. This is expressly provided for by the contract, and, indeed, such a provision was obviously necessary.

The scheduled prices are the prices at which the appellant was to be paid for extra work; and therefore, unless the rate at which he had made his calculations, and fixed the gross sum at which he agreed to do the work contracted for, corresponded exactly in all particulars with the rates mentioned in the schedule, it is plain that the proportion of the gross sum due at any moment of time for the work actually done, would not necessarily be correctly represented by the value of the same work, calculated according to the schedule of prices. Mr. Brunel states his belief to be, that, in fact, the appellant had been overpaid; which might well be, if, as was suggested, the rate of prices in the schedule was higher than that at which the contract 8 L was calculated. Mr. Brunel further says, that he stated to the appellant the fact of his being so overpaid, and that the appellant admitted it to be the case. Whether this was so or not, does not seem to me material. So much stress was laid in argument on this part of the case, that I have thought it right specially to refer to it; but, whatever be the truth, whether the appellant was, as Mr. Brunel alleges, overpaid, or whether, as alleged by Mr. Lumley, he was very much underpaid, at the time of the discussion on the subject in June, 1838, it seems to me perfectly clear that Mr. Brunel was endeavoring to frame the certificates in conformity with the stipulations of the deed — that he was making his calculations on a correct principle — that is, with reference as well to the gross sum remaining due under contract as also to the schedule of prices; and this being so, the appellant was bound to abide by the certificates as conclusive during the progress of the works, though liable to be corrected at their completion.

There was not, therefore, any ground of complaint on this head. The appellant proceeded with the works, but not with the vigor with which Mr. Brunel thought necessary; and, consequently, on the 30th July, 1838, a note, signed by Mr. Saunders, one of the secretaries of the company, was served on the appellant, calling on him to proceed regularly, and giving him notice, that, if he failed to do so, for seven days, the company would exercise the rights reserved to them by the contract, that is to say, that they would take possession of the works. The company, not considering that the appellant did proceed with sufficient vigor, acted on their notice, and, on the 28th August took, and have ever since retained, possession of the whole of the plant on the Reading line, including tools and materials, and they have since themselves completed the works. The original bill was filed on the 21st July, so that it did not, indeed it could not, make mention of the notice of the 30th July, or the subsequent seizure of the plant on the 20th August. These new facts were, however, brought before the court by the bill of revivor and supplement filed on the 5th March,

1840, by which the appellant seeks relief, in respect of this 8 L contract, similar to what he sought by the original bill in respect to the Bristol contracts. There is nothing to distinguish this 8 L contract from the others on the general question of the relief asked; and it is, therefore, unnecessary to repeat the observations already made. Having thus considered all the contracts one by one, I will now look to the prayer of the bill, to see how far the appellant makes out a title to any part of the relief which he asks. He first asks a declaration, that as to the contract 1 B, he was imposed upon in respect of the strata through which the tunnels and cuttings were to be made, and that he is entitled to be paid for these works at fair prices, without regard to the contract. I have already stated that no such case of imposition appears to me to be made out, so that all title to relief founded on it falls to the ground. The appellant then asks, secondly, a declaration, that all the clauses in the different contracts, giving any authority to Mr. Brunel as the principal engineer of the company, are fraudulent and void as against the appellant, with a declaration that he is not bound by any certificates given by Mr. Brunel.

On this head, also, I have already fully stated my reasons for thinking that the appellant has no ground for complaint, and is therefore entitled to no relief. The next head of relief asked by the bill has reference to the taking possession by the company of the works at Ruscombe on the 8 L line, and of tunnel No. 3 in the 1 B contract, according to the arrangement embodied in the paper dated the 18th April, 1838, and set out in the pleadings. The bill prays a declaration that these acts of the company, as well as the obtaining from the appellant of his signature to the paper in question, were fraudulent and void. It is unnecessary to consider these branches of the case, for they were abandoned by the counsel in argument at the bar. The bill then prays a declaration that the appellant did not incur any penalties, or if he did, then they were waived, or that the appellant is entitled to be relieved from them. I have already stated my opinion that what are in these contracts called penalties are, in fact, fixed sums agreed upon as the conventional amount of damages to be paid by the contractor in the event of his failing to do certain portions of the work before certain defined times. Nothing could be more reasonable than such a stipulation. It was obviously of vital importance to the company that the works should be completed by a stipulated time, and in order to secure this object they made it a matter of positive contract that certain particular portions of the work should be finished by certain specified times, and on failure to fulfil this engagement the contractor bound himself to pay certain stipulated sums, increasing every week, as the increased delay might be likely to be more and more injurious to the company.

All the circumstances which have been relied on in the different reported cases, as distinguishing liquidated damages from penalty, are to be found here. The injury to be guarded against was one incapable of exact calculation. The sum to be paid is not the same for every default, for that which should occasion small as for that which should cause great inconvenience, but one increasing as the

inconvenience would become more and more pressing; and, finally, the payments are themselves secured by the penalty of a bond; and this is hardly consistent with the notion that the payments secured were themselves only penal sums to secure something else. For these reasons, I think it clear that these payments, though called penalties, are in truth liquidated damages agreed on by the parties, and which the company might set off against the demand of the appellant upon them under the contract. But then the appellant contends that the company never had a title to recover these penalties, because the delays in respect of which they claimed were produced by the harassing and vexatious conduct of the respondents themselves, or their agents. It is sufficient on this head to say, that the appellant, in my judgment, wholly fails to make out, in point of fact, the proposition for which he contends. The only penalties actually deducted are 200*l.* for five weeks' delay in completing the headings of tunnels 1 and 3 in contract 1 B, and 20*l.* for delay in the works of the Avon bridge. There is no doubt but that these sums were due, unless the appellant could relieve himself by showing that the delay had been forced on him by the company itself. The evidence altogether fails to satisfy me of this. On the contrary, I think it abundantly clear, that from the very commencement of the works the appellant had not sufficient strength to prosecute them with the necessary dispatch. It may be, he says it was, that the cuttings were of a much more difficult and laborious character than he had anticipated. But, from whatever cause, he certainly did not advance with the rapidity which the engineer required, and which he had promised, and I see nothing whatever fixing the blame on any one but the appellant himself.

On the whole, therefore, I come to the conclusion that there was nothing to deprive the respondents of the right to fix the appellant with these sums, payable by way of liquidated damages, according to the contract; and there certainly is nothing to warrant the declaration asked for, that the company ever waived or abandoned their rights. The bill next prays a declaration that the company were not entitled to give the notice of the 23d June, 1838, under which, on the 2d July following, they took possession of all the plant and works on the contract 1 B and 2 B, including the 1 B extension; and further, a declaration that they were not justified in taking such possession; and that they may be ordered to account for and pay to the appellant the value of the plant and property of which they so unjustly possessed themselves. The supplemental bill prays a similar declaration and similar relief in respect to the plant and stock on the Reading line, of which the company took possession on the 20th August, 1838. The right of the company to take possession of these works depends on the question, whether, after the giving of the notices, the appellant did or did not make default in regularly proceeding with the works. If he did not, then the company or their servants were trespassers, and so were responsible in damages. This, however, is not the right insisted on by the appellant. The bill after asking the declarations as to the seizures to which I have referred, goes on to

pray for accounts of what is due to the appellant on the footing of there never having been any contracts, or of the contracts having been abandoned; and this is clearly an erroneous view of his rights, whether the seizures were or were not justifiable.

The bill prays further, that in taking the accounts of what is due to the plaintiff, it may be ascertained what was due to him at the several dates of the different advances made to him by way of mortgage, and that those advances may be treated, to the extent of the sums then due, as being payments, and not loans, with the necessary consequential directions. This relief is asked on the notion that the sums to be treated as actually payable, from time to time during the progress of the works, were not the sums certified by the engineer, but such sums as the master should find to be the real value of the work done, disregarding the contracts altogether. This, as I have already explained, is an erroneous view of the appellant's rights. The contracts cannot be disregarded; and according to the contracts, nothing was payable during the progress of the works except the sums certified, and at the times of the several mortgage advances all these sums had been fully paid. The company, therefore, had a clear right to the full benefit of the securities given by the appellant for the several advances made by way of loan on mortgage of the plant, the stock, and the reserved fund, and the appellant could not be entitled to an account on any other principles. The bill then prays, lastly, that an account may be taken of the engines, tools, materials, articles, and things of which the company took possession, and that they may be debited in account with the value thereof, with interest for the same. The right of the appellant to such an account depends on the question, whether, according to the true construction of the agreement, the company were, on taking possession of the plant, to become absolute owners of it, to all intents and purposes, or whether the possession was only to be for the purpose of enabling them to go on with the works, and to complete them at the risk and cost of the appellant, holding the plant as a security, so far as it would go, or whatever outlay, if any, they might have to make beyond what they would have had to pay under the contract in case the appellant had duly performed his engagement. The provisions of the contract are very explicit.

First, upon the appellant's default after seven days' notice, the company were authorized to proceed and complete the works themselves, paying for the same out of the money then remaining due to the appellant on account of the contract. Secondly, the payments then already made to the appellant were to be taken as full satisfaction for all works then already done by him. Thirdly, all money then due, or which would thereafter have become due, to him under the contract, and all the tools and materials in and about the works, were to become the absolute property of the company. And, fourthly, if the moneys, tools, and materials so to become the property of the company should be insufficient to cover all their charges in completing the works, then the appellant was to make good the deficiency. I assume that, in taking possession of the plant, the company did no more than, under these clauses, they were warranted in doing. The

question is, whether, having taken possession, they became absolutely entitled to all which they seized, or whether the whole provision is not to be regarded as mere machinery for enabling them to complete the works at the risk and cost of the appellant. I think the latter is the true construction of the clauses.

When I was considering the question, whether the penalties for delay were to be treated as mere penalties to secure the due performance of the work, or as liquidated damages to be paid for each default, I observed that one argument, leading strongly to the latter conclusion, was founded on the uncertain nature of the damage to be provided against—that is to say, on the impossibility of saying (as matter of mere calculation) how much the company were prejudiced by the fact that a particular portion of the work was delayed for a week, or a fortnight, or a month. This of itself afforded strong ground for construing the clause as meaning to fix the amount of damage—as being intended to make certain what was otherwise uncertain. But this test fails in the clauses now under consideration. The object of these clauses was to enable the company to do, at the cost of the appellant, the work which he had failed or seemed likely to fail in himself. The amount of their damage was capable of exact admeasurement; it was the sum which they should expend in doing what the appellant ought to have done, less the amount payable to the appellant. In such a case, if the property is made available as a fund for indemnifying the company, all the ends of the clauses in question are fully answered. It is to be observed that the property seized comprised, *inter alia*, the three reserved sums of 4,000*l.* each. It could hardly have been in the contemplation of the parties, that, without reference to what the company should be obliged to spend in completing the works, they should be at liberty to appropriate to themselves three sums of money amounting to 12,000*l.*, and that even though the work remaining to be completed might not amount to 1,000*l.*

But further, it was clearly contemplated that the company should keep an account, not only of all which they expended in completing the works, but also of all which they made by the tools and materials seized; for the appellant was to make good any deficiency, and the amount of the deficiency could only be ascertained by keeping accounts of all which was realized; and if accounts were to be kept for the purpose of charging the contractor with the deficiency, it can hardly be supposed to have been the intention of the parties, that if there was a surplus, the company should retain it for their own use. Again: it is to be observed that the right of the company to make the seizure would, in case of seven days' default after notice, arise at any period of the contract—that is, when work to the amount of only 1,000*l.* or 100*l.* remained to be done, as well as when work to the amount of 50,000*l.* was incomplete. The evidence as to the value of the plant is conflicting, but it could hardly be stated, on a rough estimate, at less than 10,000*l.*, in addition to which there were the three reserved sums of 4,000*l.* each. Now, it could hardly have been intended that the company should be at liberty to appropriate

to themselves the whole of this large stock and these sums of money without reference to the amount of what remained to be done; that they should be at liberty to make a profit from the default of the appellant—a profit which should be so much the larger exactly as the default was less inconvenient to the company. There are cases in which the mere fact, that the same sum is made payable for a small default as for a large one, has been held to prove that the sum so payable was meant merely as a penalty to secure the due performance of the act intended to be provided for, and not as a sum really recoverable. The same principle is applicable here. A default on the part of the contractor might be very injurious at one stage of the works, and very unimportant at another. So long as a large portion of the works remained to be done, a large fund might be necessary to indemnify the company when driven to undertake the prosecution of the work themselves; but when very little remained to be done, that which was only a reasonable security in the former case would become excessive. On these grounds, I have come to the conclusion that the true meaning of this part of the contract is, that the company, though at liberty to seize and appropriate the plant belonging to the appellant, were yet bound to account for its value in settling their accounts with him.

Having thus gone through the several points of the case, it now only remains to consider what the precise decree ought to have been, and how far it requires correction. The decree is set out in the Appendix, and is as follows: "This court doth declare, that for the general purposes of this decree, the portion of the railway in the pleadings mentioned, and therein described as 1 B extension, must be considered as included in the contract 1 B, in the pleadings mentioned; and the line of the said railway substituted for the line in the contract 8 L, in the pleadings mentioned, must be considered as included in the contract 8 L. And it is ordered that it be referred to the master of this court in rotation to inquire and state to the court whether the sums paid, according to the certificates in the pleadings mentioned, under contracts 1 B, 2 B, and 8 L, therein also mentioned, were the full sums that ought to have been paid according to these contracts; and whether the sums paid for the 1 B extension works prior to the month of November, 1837, were the full sums according to the scheduled prices in the 1 B contract, and afterwards according to the prices in paper C, in the pleadings mentioned; and if the sums paid in the 1 B extension, and on the three contracts 1 B, 2 B, and 8 L, were not the full sums that ought to have been paid. Then, having regard to the sums of money advanced to the plaintiff by the company on security of the indentures of the 23d March; and the 31st August, 1837, and the memorandum of the 13th November, 1837, in the pleadings respectively mentioned, or otherwise advanced by the said company, if any, the said master is to inquire whether any thing and what is due from the plaintiff to the company, or from the company to the plaintiff, and whether at the times respectively when the sums advanced by the company and secured by those indentures and memorandums, or any other sums

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were advanced, any and what sum of money was due from the company to the plaintiff; and the said master is to take an account of such sums; and if it shall be found that any sum was so due, then such sum is to be wholly or in part set off against the sums advanced by the company, as the case may be.

And it is ordered that it be referred to the said master to inquire, and accurately define and state to the court, what is common rubble, what is coursed rubble, and what is Ashlar; and, in taking the aforesaid accounts, he is to inquire and ascertain whether any and what quantity of coursed rubble was paid for as if it had been common rubble, and whether any and what quantity of Ashlar was paid for as if it had been common, or coursed rubble, and whether any thing and what is due to the plaintiff in respect of such under-payment, if any; and in taking the accounts the master is to allow interest at 5l. per cent. upon any money due, and is to have regard to the mode and time of payment prescribed by the contracts, and the right of the company to deduct certain penalties; and for the better taking the said accounts and making the aforesaid inquiries, the parties are to produce before the said master, on oath, all deeds, books, papers, and writings in their custody, possession, or power relating thereto, and are to be examined upon interrogatories, as the said master shall direct, who, in taking the said accounts, is to make unto the parties all just allowances; and, except as to the accounts and inquiries hereby directed, it is ordered that the plaintiff's bills do stand dismissed out of this court, with costs, to be taxed by the taxing master of this court in rotation. And it is ordered that such costs, when taxed, be paid by the plaintiff to the defendants respectively. And it is ordered that the defendants, the company, do permit the plaintiff, his solicitors and agents, upon reasonable notice, at all proper times and in a proper manner, to survey and inspect the line of railway, and the works thereon, included in the contracts 1 B, 2 B, and 8 L, and the line of railway described as 1 B extension, and the railway line. And this court doth reserve the consideration of all further directions and costs of suit up to this decree, not hereinbefore directed to be taxed and paid, and also the subsequent costs of these suits, until after the said master shall have made his report; and any of the parties are to be at liberty to apply to this court as they may be advised." The appellant complains of a portion only of the decree. The company complain of it altogether, contending that the bill ought to have been dismissed.

The observations I have made show that I do not agree with the view of either party. I am not prepared to say that the appellant was not entitled to some relief. I certainly do not think that he was entitled to what he asked; and it therefore, in this state of things, becomes necessary to consider what the decree below ought to have been. In the first place, then, I think that so much of the several bills as seeks a declaration that the plaintiff was imposed upon in respect to the strata on the line 1 B, and all declarations and relief consequent thereon, and as seeks to impeach the right of Mr. Brunel to act as engineer by reason of his being a shareholder, and as seeks a

declaration that the company, in possessing themselves of the works at Ruscombe Hill, and the tunnels and earthwork on the 1 B line, took undue advantage of the plaintiff, with all consequential relief thereon, and as seeks a declaration that the plaintiff's signature to the paper of the 18th April was obtained by fraud, with all consequential relief thereon, and as seeks a declaration that the plaintiff had not incurred any penalties under the contracts, and was entitled to be relieved therefrom, and as seeks a declaration that the defendants were not entitled to take possession of the works, and to give the notices for that purpose, and that by such taking possession the plaintiff was relieved from all obligation under the contracts, and that the same must be considered as abandoned, ought to be dismissed, with costs. But the appellant is entitled to a decree to the following effect: First, an account must be taken of all sums properly expended by the company in completing, according to the terms and conditions of the several contracts, the works thereby respectively agreed to be done by the appellant, including extra works, with a declaration, that for the purpose of such accounts, the 1 B extension ought to be deemed to be part of the original 1 B contract.

Secondly, an account must be taken of what is due to the company for principal and interest on the several advances made by them by way of mortgage in the year 1837; and it ought to be declared that the appellant is chargeable, in account with the company, for all sums so expended by them in the completion of the works, and also with what shall be found due in respect of the said mortgages, against what shall be found due from him on these accounts. The appellant is entitled to have an account of what would have been payable to him under the contracts at the completion thereof, in case the works had been finished by him, instead of being completed by the company; and also an account of the value of the plant, materials, and other goods, of which the company took possession in the months of July and August, 1838. And it must be declared, that, in taking the foregoing accounts, the appellant is chargeable with the sum of 200*l.* with which he is debited in the certificate of the 11th November, 1836, under the head of "penalties;" and that he is also chargeable, by way of liquidated damages, with all other sums which shall have become payable by him under the conditions of the several bonds executed by him in the penal sums of 4,000*l.*, 4,000*l.*, and 5,000*l.*, mentioned in the said three contracts 1 B, 2 B, and 8 L respectively, save only so far as the appellant shall show to the satisfaction of the court that the delay, or default in respect of which any such liquidated damages are claimed was occasioned by the act or default of the company, their agents or servants; and save also, that no penalty is to be deemed payable under the said bonds respectively from and after the time when the company took possession of the works to which such bonds respectively related.

The third bill — that, I mean, relating to the particular nature of the masonry work done — was wholly unnecessary, and must be dismissed, with costs. I do not think it necessary to consider whether it was, as is alleged by the respondents, demurrable. It was cer-

tainly, with reference to the only accounts to which the appellant is entitled, quite unnecessary. The masonry work on which the question arises was either work included in what was to be done for the original contract sums, or it was extra work. I collect that it was chiefly of the latter description. Certainly, all that to which the evidence of Lloyd is directed in the forty-sixth interrogatory, and as to which the dispute is said to have taken place between Mr. Babbage and the appellant, was of the latter description, for that dispute occurred in September, 1836; and the appellant in his letter of the 2d November, 1836, and the inclosed account, gives a detailed statement of the work done up to that date, exclusive of contract work, and he does not there include any masonry at all, so that the question raised in September must have been as to extra work. But, as I have so frequently stated, the appellant during the progress of the works was bound by the decision of the engineer; and if he, in giving his certificates for extra work, certified for what was, in truth, Ashlar masonry, only at the lower rate payable for coursed rubble, it was certainly open to the appellant at the end of the contract to act on the power reserved to him by the contract, of having the error set right by the means there provided. With respect to masonry work done under the contracts not being extra work, the case is not precisely the same. The appellant was, by the terms of his contract, bound to conform himself to the directions of the engineer. The point he makes is, that the engineer, in cases where the contract required only coursed rubble, obliged him to put in Ashlar masonry.

It is to be observed that the different kinds of masonry differ rather in degree than in kind. It may not always be easy to say, as to any particular work, under which description it ought to be classed. If the engineer required from the appellant masonry of a different character from that which, by his contract, he was bound to execute, the proper course for him to pursue was to obtain from the engineer a written direction as to the kind of work he was to execute. I see nothing whatever leading to the inference that such an order or direction would have been refused; and if the appellant is right in saying that the masonry required was not that which the contract bound him to execute, then the written direction would have entitled him to be paid for the work so executed, as for an alteration of the work contracted for; and if the certificates were not framed according to the value of such altered work, then at the completion of the whole, the matter would have been set right. I can discover no reason whatever for a separate bill on this subject: it is merely a dispute as to a particular class of items in the accounts to be taken. The filing of a separate bill for such a purpose was altogether unnecessary, and the costs must be borne by the appellant. I have thus gone through the whole of this long and complicated case, and the course which I venture respectfully to recommend to the house is, that your lordships should declare the rights of the parties to be such as I have just indicated; and, with such a declaration, to refer it back to the Court of Chancery to deal further with the case as justice may require. The appellant, by the terms of his bill, expressly submits to pay what, if

any thing, should be found due from him, so that after the accounts have been taken, full justice may be done to both parties. I do not recommend your lordships to make any order as to the costs of the appeal: each party must bear his own.

LORD BROUGHAM. My lords, we have at length arrived at the end of this very long case, and, although my noble and learned friend has justly said that the argument lasted for many days, I can add that it lasted for almost an equal number of days some five or six years ago, when it was before this house, and when the unhappy circumstance of the death of our noble and learned friend, the then lord-chancellor, prevented the house from coming to a decision upon the question. My lords, I cannot sufficiently express my admiration of the great clearness of the statements of my noble and learned friend who has so ably gone through the whole particulars of the case, or of the acuteness, only to be equalled by the patience, which he has shown in bringing the whole of these matters before the house. It is for me only to address a few observations to your lordships upon those parts of the case on which I had originally entertained some doubt, both in the former session and in this; and I think it better that I should confine myself to those points, than that I should endeavor to follow my noble and learned friend over the whole ground over which he has gone. Now, my lords, the first three prayers of this bill refer to fraud and imposition. The first alleged imposition is respecting the fallacious representations which have been made touching the kind of stone through which the railway was to be made; the second is respecting the possession of shares by the engineer, Mr. Brunel, unknown to the appellant; and the third relates to the obtaining fraudulently the signature of Mr. Ranger on the 18th April. Upon only one of these three heads am I about to offer any remarks to your lordships—I mean the second—that respecting the possession of shares by the engineer. With regard to the third and last, the transaction of the 18th April, that was, in fact, abandoned; and the first, respecting the alleged fallacious misrepresentations made to the contractor respecting the nature of the strata, has been so ably discussed by my noble and learned friend, upon grounds in which I entirely agree with him, that I have only one single remark to make respecting the sand stone, which I think he omitted—namely, that there appears from the evidence to be almost as great a difference in the hardness of the sand stone, and the consequent difficulty of working through it, as of the other kind of strata that was alleged to be in contrast with it.

My lords, we then come to the possession of the shares by the engineer, upon which I certainly originally entertained very considerable doubt; but, upon further consideration of the particulars of the relative position of the principal engineer and the company, and also of the relative position of the engineer and the company on the one hand, and the contractor on the other, by contracts one, two, and eight, I have made up my mind to agree with my noble and learned friend in the conclusion that this does not, when well and duly con-

sidered, support the claim of the appellant. The position of the engineer was such that he really may be said to have, in some respects altogether, and in all respects almost altogether, represented the company. He may almost be taken for the company in all respects, but in some respects he must be taken altogether as being the company. The case of *Dimes v. The Grand Junction Canal Company* is that of a judge, a person clothed with high judicial functions, being found to have been a party in the case, from being interested in the subject-matter which came before him, before his decision. We have here the case, not of a judge — not, indeed, of any thing like a judge. The utmost that he can be said to be is a kind of referee, to whom certain matters were, by the agreement of the parties, to be referred — I will not say for his arbitration, but rather for his report and acting upon. In some respects it is found that the company is often stated in the alternative.

It is said: "If it shall appear to the said company, or their principal engineer for the time being, or his assistant resident engineer;" and, "in all cases proper materials, to the satisfaction of the said company, or their principal engineer." However, looking at him in those matters in which he may be said more to decide judicially — for example, the estimates, and the certificates which he was to give — I consider that here he was the known officer of the company. He is not named personally as Mr. Brunel, but as "the principal engineer for the time being:" whoever the company appointed as the engineer for the time being, was to give these certificates and make these payments. Nay, moreover, he is to decide, as it were, upon appeals from the assistant or resident engineer; for it is provided, that the resident engineer differing from the contractor upon any of these matters, Mr. Brunel is to decide. Then, my lords, was it not known to the contractor that Mr. Brunel was the engineer of the company — that he was largely interested on the side of the company as their paid servant, and largely profiting by his connection with the company? Was it not known that he might hold shares in the company? Was it not generally understood amongst engineers, (though I do not go so far as the Vice-Chancellor of England, who said it was notorious that in all instances the engineers were shareholders,) and must it not have been very well known to Mr. Ranger, that it was an ordinary case for the engineers to hold shares? He might have made that an exception in the contract, and required that he should not hold shares; but that provision has not been made. The interest which he had in shares was perfectly trifling compared with his general interest arising out of his connection with the company.

Had this proviso been made, this absurdity would happen, to which my noble and learned friend has adverted, that, although not possessed of shares at that time, he might any day have become possessed of shares — he might have purchased them — nay, more, he might have inherited them; they might have come to him by descent, and then he would have been put in this position — that he must either have given up what had come to him, or have ceased to be the engineer employed by the company; for if he had continued

possessed, either by purchase or inheritance, of a single share, according to the rigour of the argument deduced from *Dimes v. The Grand Junction Canal Company*, he must have ceased to act under these covenants, and the whole operations of the company must at once have been convulsed. I think, therefore, my lords, upon the whole, there is no ground for considering that the position in which he was placed was a *quasi* judicial position. I think it is clear that he was the company; that the contractor considered him as the company; and that in all matters, as in this, the interests of the company and of their engineer were the same; and that, with his eyes open, he put himself, to a certain degree, in the hands of the company, only securing himself by the express stipulations which are made to limit the discretion of the company; for I look really upon Mr. Brunel, the principal engineer, for the time being, in this case, as the company itself. My lords, I have known cases, and I suggested an instance during the argument at the bar, in which, in private local acts of considerable importance, there has been an express provision that certain judicial proceedings shall take place, in which a jury shall be impanelled, and shall act under one or other of the directors of the company. Although the company is, in fact, the party interested, yet one or other of their directors, as I have seen while at the bar, sits to direct the jury to dispose of questions of evidence, and to decide upon the admission of one piece of evidence and the rejection of another; and this is the case although they were in fact the party between whom and the claimant to compensation the whole proceedings were then going on. This is found to be a convenient arrangement; and an arrangement of this sort, for the convenience of the work and of both parties, appears to have been voluntarily entered into by the parties to this suit.

My lords, the next head upon which I would wish to make a few observations is one upon which I certainly had some doubt during the argument — I mean, whether the evidence was sufficient to meet that part of the prayer of the bill, the fourth and fifth parts, which relate to the taking possession of the plant by the company — whether there was sufficient evidence of the notice having been given, and not acted upon; that is to say, first, the notice of the 23d June, and then the notice of the 2d July — that of the 23d June having led to the taking possession by the company on the 30th or 31st July, and that of the 2d July having led to the taking possession by the company on the 20th August. I have a doubt whether there was sufficient evidence to support the company in these two instances — I mean, of the non-performance, as required, by the contractor, after seven days' notice had been given. But even if I had still a doubt upon that question, I entirely agree with my noble and learned friend that this would have been the ground of an action of trespass, and that, in fact, the fourth prayer of the bill is really turning an action of trespass into a bill in equity — it is calling upon a court of equity to give damages for a trespass; because, if there was no sufficient ground for the seizure, if the company were trespassers, an action at law might have been maintained against them for damages on account of the

seizure. But in the sixth prayer they take another view of the matter; the first prayer is for damages and for an account—that is to say, equitable damages, so to speak; a kind of fusion is attempted in this case; equitable damages for taking possession, when, the notice having been given, there was no laches on the part of the contractor. But the sixth prayer is, to pass by the contract altogether, and, in respect of the tortious possession, to disaffirm or set aside the contract, and to give the contractor the benefit, or a *quantum meruit*, as if there had been no contract. Now, I entirely agree with my noble and learned friend that this is what we cannot do, and what the Court of Chancery, from which the appeal proceeds, could not do, and that the appellant must be left on that ground to his action at law, and that this tortious act of the company did not get rid of the contract, and entitle him to go beside or above or beyond the contract, and to obtain an account, as is there sought for.

Then, my lords, upon the eighth contract, I had also, during the argument, some little doubt, both upon the present and upon the former occasion; but I agree on the whole with my noble and learned friend that the deviation of 100 or 200 yards was no more than might naturally be said to be incident to a work of this sort, in order, for example, to avoid a tunnel; and that it appears from the evidence that even the new line, the line actually taken, went over the same fields that the abandoned line had gone over; and there was so much of identity between the two, that, if I well remember, the same drawings and plans were used, and were held to be sufficient for the line which was actually taken as had originally been made to suit the line that was abandoned. This went on, and was adopted by the appellant, I mean the contractor, and he went on upon this new line independent of that. My lords, the last point upon which I have a word to say, in addition to the statement of my noble and learned friend, refers to the question of liquidated damages; and I greatly lament that the law has been laid down by cases upon which it is too late to make any comment, except to express one's regret at its having been laid so down as to make it no other than a question, in every case, of the intention of the parties to decide whether the thing should be taken for a penalty or as liquidated damages; and I think this has been lamented formerly by learned judges; and although Lord Eldon very cautiously, as was his wont, expresses himself on this matter, yet it is impossible to read the leading case on the subject in the court of common pleas during the short time that that most learned judge sat in that court—the case of *Astley v. Wheldon*—and it is impossible to read what fell from the noble and learned lord in that case, without seeing that he was dissatisfied with the former current of cases. He expresses the great difficulty which he had often found in making his way through those cases, and I think there can be but little doubt that he lamented the course which the law had taken.

But, my lords, it is now too late to alter this, and we are in every case bound to consider whether we are to grant liquidated damages or penalties, according to the principles that those cases had estab-

lished. According to those principles, I have no doubt whatever that in this case liquidated damages are due as regards the fourth prayer of the bill—I mean those injuries sustained by the company by the delay in a case in which that delay was increasing, and in which no specific sum could be apportioned in respect of a particular injury done to the company. In those cases, I agree with my noble and learned friend that we must consider them as liquidated damages, as a compensation to the company for the loss sustained by the delay. In the other case it is equally clear, upon the principles laid down both in *Astley v. Wheldon*, to which I have referred, and also in a case which was referred to in 6 Bing., that it is to be taken as penalty. There can be no doubt that the court from which this appeal comes went as far as possible in setting aside all reference to the intention of the parties, and they held, distinguishing between the different matters which were in the consideration of the parties when they entered into the covenant, that one was to be taken as liquidated damages, and the other as penalty, although it was perfectly clear, as clear as words could make it, that the parties had intended the whole to be taken as liquidated damages, and not as penalty. The learned judge, in giving the decision of the court, says: “It is difficult to suppose any words more explicit or express than those used in the agreement; the same declaration not only states affirmatively that the sum of 1,000*l.* should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty, or in the nature of a penalty.”

Yet, nevertheless, because there were some things that were so specific, and others less specific and more general, the court thought that they were bound by the current of cases to draw that distinction between the two, and that, in spite of the positive and distinct statement of the meaning of the parties, they were bound to consider that the parties did not mean that to be taken as to the whole, but only as to a part, and, therefore, to decide that a part of the sum should be penalty, although the party had said that none should be penalty, and that the other part should be liquidated damages, although the parties intended that this character should apply to the whole. My lords, I cannot but regret that these refinements have found their way into our law in consequence of the Remedial Act of the 8 & 9 Will. 3, respecting the relief of parties on bonds for the performance of a covenant, the penalty being by that act confined to the damage actually sustained by a breach of the covenant. Cases have occurred in which no great weight has been given to the remedy afforded by the act, the statute of Will. 3; and the court has held in several cases, upon great consideration, that the party claiming compensation had no election to proceed paramount the statute, or go to his remedy at common law, but that the statute was to be obeyed; they held that he had no election at all. I think it is that statute which has led to the decisions that have found their way into our law upon the doctrine of liquidated damages.

However, my lords, we have no choice in the instance that I have referred to, as to the fourth prayer of the bill, but to consider them

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as liquidated damages; and with regard to the other, we must consider them as in the nature of penalty. The result is, as has been stated by my noble and learned friend, that we must decide against the appellant, both on the original appeal and upon the cross appeal. But, my lords, I fear that we cannot say that we shall put an end to this case, but it must undergo some further inquiry upon matters which have been mentioned by my noble and learned friend, in the Court of Chancery.

**LORD CHANCELLOR.** It will be referred back to the Court of Chancery for information.

*Solicitor-General.* With the declarations and accounts made and directed?

**LORD CHANCELLOR.** Yes; the declaration is substantially what I stated. There must be an account taken in favor of the appellant of what would have been payable to him if he had been allowed to complete the contract; also the value of the stock. On the other hand, he must be charged with all sums of money properly expended in completing the work that he was bound to have completed, and also be charged with the sums due on mortgage and interest, and under the bonds.

*Decree reversed, with declarations, and case remitted.*

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SADLIER and another v. Biggs.

July 5, 1853.

*Lease for Lives—Covenant for Perpetual Renewal—Irish Registry Act—Memorial—Evidence.*

A bill was filed for a renewal, setting forth articles of demise of 1746, by a party then seised in fee, and alleged to contain a covenant for perpetual renewal; that such articles were lost, but that a registered memorial, executed by the grantee only, existed in the registry office in Ireland; and that, in conformity with the said covenant, a lease was executed in 1750, by the grantor in the alleged articles, who, in the interim, had become tenant for life, containing such a covenant, and reciting articles, also showing subsequent renewals successively by tenants for life:—

*Held*, (affirming the decree of the court of chancery in Ireland,) that the memorial of the articles, though not executed by the grantor, was admissible in evidence against those claiming under him as purchasers both of the execution of such articles and also of their contents, and that the successive renewals by subsequent tenants for life were evidence, in support of the memorial against the remainder-man, of the execution of such alleged articles.

*Held*, further, that an agreement contained in a memorial to demise certain lands for three lives, "with a clause of renewal, provided lessee, his heirs, &c. should, within six calendar months from the death of the last of the said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as

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well all rent and arrears that should be due for the half-year after the fall of such life as the sum of 11*l.* 7*s.* 6*d.* for renewing or adding such life or lives forever," was sufficiently distinct to import a covenant for perpetual renewal.

THIS was an appeal from a decree of the Court of Chancery in Ireland, ordering the appellant to renew a lease to the respondent, of certain lands in the county of Tipperary.

The bill, filed in June, 1845, by the respondent, and afterwards amended, stated that Charles Sadlier, late of Castletown, in the county of Tipperary, deceased, was, at the time of the execution of the articles thereafter mentioned, seised as of fee in the lands of Belview, sufficient to enable him to make a valid lease thereof for lives with covenant for renewal forever; and being so seised, by certain indented articles, bearing date 5th January, 1746, and made between Charles Sadlier of the one part, and John Chawner, of Ballyguider, of the other part, Charles Sadlier demised, or agreed to demise, to John Chawner, his heirs, executors, administrators, and assigns, among other lands, the town lands and premises described and comprised in and demised by the indenture of lease next thereafter mentioned, for and during the lives and life of the persons therein named, and the survivor of them, at the yearly rent of 92*l.* 10*s.*; and in which articles, it was averred, was contained a covenant for perpetual renewal.

That the plaintiff had not in his possession or power those articles bearing date 5th January, 1746; nor did he know in whose custody they were, but believed they had been long since lost or destroyed by time or accident; but a memorial thereof, duly perfected by said John Chawner, was duly registered in the proper office for registering deeds in Ireland, of date 7th January, 1746; and which were stated in said memorial to contain a clause of renewal after the expiration of said lives thereinbefore mentioned; provided said Chawner, his heirs, executors, administrators, and assigns, should, within six calendar months, to be computed from the death of the last of said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as well all rent and arrears that should be due for the half-year after the fall of such life as the sum of 11*l.* 7*s.* 6*d.* for adding or renewing such life or lives forever; as by the said original articles, or a counterpart thereof in the possession of the defendant Thomas Sadlier, had plaintiff the same to produce, or by said memorial, or an attested copy thereof when produced and proved would fully appear.

That by indenture of lease and release, dated 2d March, 1750, and made between Charles Sadlier of the one part, and John Chawner of the other part, reciting that Charles Sadlier, by articles bearing date 5th January 1746, had demised to John Chawner and his heirs, the lands, &c., for and during the three lives therein named, and the longest liver of them, at the yearly rent of 92*l.* 10*s.*, with a covenant to renew the same forever, on payment of 11*l.* 7*s.* 6*d.* for renewing the same on the fall of every life, within six months next after the fall of each life; and that it was thereby further agreed that leases should be perfected at the request of either party, reciting that the lease of Colonel Butler's thirty-seven acres had expired, and that the

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rents agreed upon between the parties to the indenture then in recital, for the remainder of the lands then in the possession of John Chawner, amounted to 90*l.* 8*s.* yearly, over and above the rent of Colonel Butler's acres; it was witnessed that Charles Sadlier, in pursuance of the indented articles, and for the considerations therein mentioned, demised unto John Chawner, his heirs and assigns, the lands of Ballyguider, Knockanalea, and Gurtmungagh, which the plaintiff averred to be a sub-denomination of some of the town-lands comprised in the articles of the 5th January 1746, for three lives at the rent of 90*l.* 8*s.*, with covenant for perpetual renewal in these words: "That upon the death or failure of the aforesaid life or lives of the said John Chawner, Daniel Alt, and Joseph Palmer, or any or either of them, and upon the said John Chawner, his heirs or assigns, first paying or causing to be paid unto the said Charles Sadlier, his heirs or assigns, the sum of 11*l.* 7*s.* 6*d.* over and above the annual rent hereinbefore reserved within the space of six calendar months next immediately after the death or failure of such life, and upon the nomination of the life of any other person, by the said John Chawner, his heirs or assigns, within the said six months, to the said Charles Sadlier, his heirs or assigns, to be put and inserted in the place and stead of the person so happening to die as aforesaid; and that the said Charles Sadlier, his heirs or assigns, will, within the said six months from the death of such person so happening to die as aforesaid, add and insert to the time and term of this lease, the life of such person so to be nominated, in the place and stead of the person so happening first to die as aforesaid, which life so to be added is to be indorsed on this lease, or to be written in a deed, label, or parchment, to be affixed to this lease for that purpose, or in a separate deed or writing, as the said John Chawner, his heirs or assigns, shall think most proper and convenient, declaring the life so added in lieu of the life so failing, to be, with the life and lives then in being, the three lives during which the said estate shall be then to continue, and so in like manner from time to time successively forever hereafter on the failure of every other several life or lives in this lease now nominated, or hereafter to be successively nominated as aforesaid, and upon the like payment of the sum of 11*l.* 7*s.* 6*d.*, and upon the like nomination of any other life successively to be added in lieu of every several life so failing as aforesaid, within the space of six months, as aforesaid, that the said Charles Sadlier, his heirs or assigns, will, within the said six months next after the failure of every other several life so to be nominated as aforesaid, add and insert to the time and term of this lease, from time to time forever, the several life or lives of such person or persons to be nominated in the place or stead of the life or lives of the several person or persons so successively happening to die as aforesaid." This deed was duly registered.

That Benjamin Biggs, in whom the estate and interest of John Chawner in said demised premises was then vested, exhibited his petition in the High Court of Chancery in Ireland, on the 8th February, 1769, against the Rev. Ralph Grattan and Thomas Sadlier, a minor, (in whom the reversion in said demised premises was then

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vested by the said Ralph Grattan, his guardian,) stating said indenture of lease to contain a covenant on the part of the lessor and his heirs to renew said lease from time to time forever, and praying that the petitioner should be declared entitled to a renewal of said indenture of lease. That several proceedings were had upon that petition, and that, finally, Ralph Grattan, in pursuance of an order made on the petition, executed a renewal to Benjamin Biggs, bearing date 8th March, 1770. That some of the lives in the last-mentioned renewal having dropped, Thomas Biggs, (in whom the estate and interest of John Chawner was then vested,) on the 28th November, 1776, filed his bill in the Court of Chancery for a renewal of the lease of 2d March, 1750; and that Thomas Sadlier, in his answer to that bill, admitted that his father, Charles Sadlier, had, after attaining his age of twenty-one years, by said articles, demised to John Chawner and his heirs, the lands in said articles, and in said indenture of lease mentioned, to hold for the lives therein named, with covenant to renew the same forever; and that, pending the suit, Thomas Sadlier submitted to execute a renewal of the lease on 6th March, 1782, to Thomas Biggs for the three lives therein named, and for such other lives as should forever thereafter be added thereto pursuant to the covenant for perpetual renewal in that lease contained. That at the time of swearing his answer, and also of the execution of this renewal, Thomas Sadlier was fully competent to bind the inheritance by his acts. That the lease was renewed subsequently by indenture bearing date 21st November, 1797, pursuant to the covenant for renewal contained in the articles of agreement and in the lease of 2d March, 1750.

The bill setting forth subsequent renewals, stated: "And plaintiff relies on said original indenture of renewal and agreements, and the several recitals and statements therein respectively contained, as evidence that articles of agreement bearing date 5th January, 1746, contained a covenant for the renewal of said interest forever." The bill, having shown title in the plaintiff and defendant, stated that in or as of Michaelmas term last, the defendant, Thomas Sadlier, brought an action of ejectment on the title to obtain possession of the lands and premises comprised in and demised by the lease of 2d March, 1750; and that plaintiff duly took defence to said ejectment, but, being subsequently advised that the trial at law would be attended with considerable delay and expense, and the plaintiff having recently discovered that Thomas Sadlier the elder, who executed a renewal in 1814, had only a life estate in remainder in the lands and premises, the plaintiff was advised to give a consent for judgment with stay of execution until the 22d May next. That the defendant had accordingly caused judgment to be marked under the consent in that action.

The bill prayed that it be referred to the Chief of Second Remembrancer to take an account of the sums due and owing by plaintiff for rent, and several fines and interests on foot of said lease; and that upon payment thereof the said defendants, Thomas Sadlier and Thomas Sadlier the younger, may be decreed to execute a renewal

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thereof to the plaintiff for lives thereafter for that purpose nominated, pursuant to the covenant for renewal thereof forever, contained in the said original articles, and in said lease in pursuance of said articles, and bearing date respectively 5th January, 1746, and 2d March, 1750, plaintiff being ready and willing and thereby offering to accept such renewal, and to pay such rent and renewal fines and interest, and for an injunction against further proceeding in the ejectment.

The registered memorial of the articles was as follows: "Memorial of certain indented articles dated the 5th January 1746, made and concluded between Charles Sadlier, of Castletown, in the county of Tipperary, Esq., and John Chawner of Ballyguider, in said county, farmer, whereby the said Charles Sadlier, for considerations therein mentioned, demised unto the said Chawner, his heirs, executors, administrators, and assigns, as well that part of the town and lands of Ballyguider, containing thirty acres, or thereabouts, commonly called the 'Wood Park,' lately held by cottiers, and forty acres, being part of the lands of Knockanalea adjoining Ballyguider aforesaid, lately possessed by Oliver Deane, as such other parts or parcels of said town and lands of Ballyguider and Knockanalea, heretofore held by said Chawner, containing in the whole 350 acres, be the same more or less, to hold the same with their appurtenances, in as full and ample a manner as said Chawner, the said cottiers, and said Deane, enjoyed the same, (except as therein excepted,) to him the said Chawner, his heirs, executors, administrators, and assigns, from the 1st November last past, for and during the lives of said Chawner, Daniel Alt, and Joseph Palmer, son of John Palmer, of Little Altagh, and the longest liver of them, at and under the yearly rent of 92*l.* 10*s.* payable half-yearly, on every 1st May and 1st November, with a clause of renewal after the expiration of said lives thereinbefore mentioned, provided said Chawner, his heirs, executors, administrators, and assigns, should within six calendar months, to be computed from the death of the last of the said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as well all rent and arrears that should be due for the half-year after the fall of such life, as the sum of 11*l.* 7*s.* 6*d.* for renewing or adding such life or lives forever. And that leases should be perfected at the request of either party, with usual covenants between landlord and tenant, on foot of which said articles there is a memorandum in respect of ascertaining the rent between the said parties in such manner and to such purpose as therein mentioned; and which said articles and memorandum were duly executed by said Charles Sadlier and John Chawner, and witnessed by John Geale of the city of Dublin, gentleman; and the above memorial was duly perfected by the said John Chawner, and witnessed by the said John Geale and Henry Chawner.

"JOHN CHAWNER, (seal.)

"Signed and sealed } JOHN GALE,  
in presence of } HENRY CHAWNER."

J. Gale added the usual affidavit as to Chawner's execution of the articles.

The defendant Thomas Sadlier, in his answer denied that any articles ever existed, or, if any such had been entered into, that they contained any covenant for perpetual renewal or were lost by time or accident; and admitting a memorial to the effect stated in the bill did appear in the registry office, he relied on the fact that it was not executed by Charles Sadlier; also that, as the memorial was not executed by Charles Sadlier, and as the possession of the lands by John Chawner, and those claiming under him, might be accounted for under the lease of 2d March, 1750, which was not registered till 1st August, 1752, independently of the existence of such alleged articles, the memorial afforded no sufficient evidence of the existence and contents of such alleged articles against the defendant claiming under a marriage settlement of 1st February 1750, which was duly registered on 10th June 1751, by which, and before the execution of the lease, Charles Sadlier had become tenant for life only in the reversion; further, that, even supposing the memorial to be evidence of the existence and contents of such alleged articles, yet the clause or covenant for renewal contained in it was not a covenant for perpetual renewal, but a special covenant for one renewal of the lease after the death of all the lives in the alleged articles named; that the clause or covenant was not sufficiently certain as to the terms of any renewal except a single renewal, or as to the amount of the fine to be paid on such further renewal, namely, whether a fine was to be paid on the further renewal of each new life, or for each three new lives. The defendant also relied on the fact that, although prior to 1st February, 1750, Charles Sadlier was seised in fee, yet from that day, by virtue of his marriage settlement, registered prior to the lease, and at the time of the execution of the lease of 2d March, 1750, he was tenant for life only, and not capable to bind the inheritance or to make a valid lease for lives with covenant for renewal forever; that therefore, the lease of 1750 and covenant was invalid against the defendant; also that all the lessors in the subsequent renewals were each, by virtue of marriage settlements, under which the defendant claimed, tenants for life only, without a power of leasing for a longer time; and, therefore, submitted he was not bound by any admissions or statements made by any of those parties, or in the answer of Thomas Sadlier, or by the execution by those parties of the several renewals, executed, as he insisted, under a mistake.

The cause was heard in 1847, in the equity side of the Court of Exchequer, and it was decreed that respondent was entitled to a specific execution of the articles of 5th January, 1746, and to a renewal of the lease of the lands comprised in said articles, except Butler's acres, (to which plaintiff admitted he was not entitled,) at the yearly rent of 90*l.* 8*s.*, and a renewal fine of 11*l.* 7*s.* 6*d.* on the fall of each life, and so *toties quoties* forever, renewable on fall of each life. And it was thereby referred to the chief or second remembrancer to take an account of what was due to defendant on foot of fines, rent, and interest, and also to settle and approve of the form of a proper draft renewal, and to ascertain what lands should be included therein; and it was thereby directed that he should not include there-

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as liquidated damages; and with regard to the other, we must consider them as in the nature of penalty. The result is, as has been stated by my noble and learned friend, that we must decide against the appellant, both on the original appeal and upon the cross appeal. But, my lords, I fear that we cannot say that we shall put an end to this case, but it must undergo some further inquiry upon matters which have been mentioned by my noble and learned friend, in the Court of Chancery.

LORD CHANCELLOR. It will be referred back to the Court of Chancery for information.

*Solicitor-General.* With the declarations and accounts made and directed?

LORD CHANCELLOR. Yes; the declaration is substantially what I stated. There must be an account taken in favor of the appellant of what would have been payable to him if he had been allowed to complete the contract; also the value of the stock. On the other hand, he must be charged with all sums of money properly expended in completing the work that he was bound to have completed, and also be charged with the sums due on mortgage and interest, and under the bonds.

*Decree reversed, with declarations, and case remitted.*

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SADLIER and another v. BIGGS.

July 5, 1853.

*Lease for Lives—Covenant for Perpetual Renewal—Irish Registry Act—Memorial—Evidence.*

A bill was filed for a renewal, setting forth articles of demise of 1746, by a party then seised in fee, and alleged to contain a covenant for perpetual renewal; that such articles were lost, but that a registered memorial, executed by the grantee only, existed in the registry office in Ireland; and that, in conformity with the said covenant, a lease was executed in 1750, by the grantor in the alleged articles, who, in the interim, had become tenant for life, containing such a covenant, and reciting articles, also showing subsequent renewals successively by tenants for life:—

*Held*, (affirming the decree of the court of chancery in Ireland,) that the memorial of the articles, though not executed by the grantor, was admissible in evidence against those claiming under him as purchasers both of the execution of such articles and also of their contents, and that the successive renewals by subsequent tenants for life were evidence, in support of the memorial against the remainder-man, of the execution of such alleged articles.

*Held*, further, that an agreement contained in a memorial to demise certain lands for three lives, "with a clause of renewal, provided lessee, his heirs, &c. should, within six calendar months from the death of the last of the said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as

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well all rent and arrears that should be due for the half-year after the fall of such life as the sum of 11*l.* 7*s.* 6*d.* for renewing or adding such life or lives forever," was sufficiently distinct to import a covenant for perpetual renewal.

THIS was an appeal from a decree of the Court of Chancery in Ireland, ordering the appellant to renew a lease to the respondent, of certain lands in the county of Tipperary.

The bill, filed in June, 1845, by the respondent, and afterwards amended, stated that Charles Sadlier, late of Castletown, in the county of Tipperary, deceased, was, at the time of the execution of the articles thereafter mentioned, seised as of fee in the lands of Belview, sufficient to enable him to make a valid lease thereof for lives with covenant for renewal forever; and being so seised, by certain indented articles, bearing date 5th January, 1746, and made between Charles Sadlier of the one part, and John Chawner, of Ballyguider, of the other part, Charles Sadlier demised, or agreed to demise, to John Chawner, his heirs, executors, administrators, and assigns, among other lands, the town lands and premises described and comprised in and demised by the indenture of lease next thereafter mentioned, for and during the lives and life of the persons therein named, and the survivor of them, at the yearly rent of 92*l.* 10*s.*; and in which articles, it was averred, was contained a covenant for perpetual renewal.

That the plaintiff had not in his possession or power those articles bearing date 5th January, 1746; nor did he know in whose custody they were, but believed they had been long since lost or destroyed by time or accident; but a memorial thereof, duly perfected by said John Chawner, was duly registered in the proper office for registering deeds in Ireland, of date 7th January, 1746; and which were stated in said memorial to contain a clause of renewal after the expiration of said lives thereinbefore mentioned; provided said Chawner, his heirs, executors, administrators, and assigns, should, within six calendar months, to be computed from the death of the last of said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as well all rent and arrears that should be due for the half-year after the fall of such life as the sum of 11*l.* 7*s.* 6*d.* for adding or renewing such life or lives forever; as by the said original articles, or a counterpart thereof in the possession of the defendant Thomas Sadlier, had plaintiff the same to produce, or by said memorial, or an attested copy thereof when produced and proved would fully appear.

That by indenture of lease and release, dated 2d March, 1750, and made between Charles Sadlier of the one part, and John Chawner of the other part, reciting that Charles Sadlier, by articles bearing date 5th January 1746, had demised to John Chawner and his heirs, the lands, &c., for and during the three lives therein named, and the longest liver of them, at the yearly rent of 92*l.* 10*s.*, with a covenant to renew the same forever, on payment of 11*l.* 7*s.* 6*d.* for renewing the same on the fall of every life, within six months next after the fall of each life; and that it was thereby further agreed that leases should be perfected at the request of either party, reciting that the lease of Colonel Butler's thirty-seven acres had expired, and that the

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rents agreed upon between the parties to the indenture then in recital, for the remainder of the lands then in the possession of John Chawner, amounted to 90*l.* 8*s.* yearly, over and above the rent of Colonel Butler's acres; it was witnessed that Charles Sadlier, in pursuance of the indented articles, and for the considerations therein mentioned, demised unto John Chawner, his heirs and assigns, the lands of Ballyguider, Knockanalea, and Gurtmungagh, which the plaintiff averred to be a sub-denomination of some of the town-lands comprised in the articles of the 5th January 1746, for three lives at the rent of 90*l.* 8*s.*, with covenant for perpetual renewal in these words: "That upon the death or failure of the aforesaid life or lives of the said John Chawner, Daniel Alt, and Joseph Palmer, or any or either of them, and upon the said John Chawner, his heirs or assigns, first paying or causing to be paid unto the said Charles Sadlier, his heirs or assigns, the sum of 11*l.* 7*s.* 6*d.* over and above the annual rent hereinbefore reserved within the space of six calendar months next immediately after the death or failure of such life, and upon the nomination of the life of any other person, by the said John Chawner, his heirs or assigns, within the said six months, to the said Charles Sadlier, his heirs or assigns, to be put and inserted in the place and stead of the person so happening to die as aforesaid; and that the said Charles Sadlier, his heirs or assigns, will, within the said six months from the death of such person so happening to die as aforesaid, add and insert to the time and term of this lease, the life of such person so to be nominated, in the place and stead of the person so happening first to die as aforesaid, which life so to be added is to be indorsed on this lease, or to be written in a deed, label, or parchment, to be affixed to this lease for that purpose, or in a separate deed or writing, as the said John Chawner, his heirs or assigns, shall think most proper and convenient, declaring the life so added in lieu of the life so failing, to be, with the life and lives then in being, the three lives during which the said estate shall be then to continue, and so in like manner from time to time successively forever hereafter on the failure of every other several life or lives in this lease now nominated, or hereafter to be successively nominated as aforesaid, and upon the like payment of the sum of 11*l.* 7*s.* 6*d.*, and upon the like nomination of any other life successively to be added in lieu of every several life so failing as aforesaid, within the space of six months, as aforesaid, that the said Charles Sadlier, his heirs or assigns, will, within the said six months next after the failure of every other several life so to be nominated as aforesaid, add and insert to the time and term of this lease, from time to time forever, the several life or lives of such person or persons to be nominated in the place or stead of the life or lives of the several person or persons so successively happening to die as aforesaid." This deed was duly registered.

That Benjamin Biggs, in whom the estate and interest of John Chawner in said demised premises was then vested, exhibited his petition in the High Court of Chancery in Ireland, on the 8th February, 1769, against the Rev. Ralph Grattan and Thomas Sadlier, a minor, (in whom the reversion in said demised premises was then

vested by the said Ralph Grattan, his guardian,) stating said indenture of lease to contain a covenant on the part of the lessor and his heirs to renew said lease from time to time forever, and praying that the petitioner should be declared entitled to a renewal of said indenture of lease. That several proceedings were had upon that petition, and that, finally, Ralph Grattan, in pursuance of an order made on the petition, executed a renewal to Benjamin Biggs, bearing date 8th March, 1770. That some of the lives in the last-mentioned renewal having dropped, Thomas Biggs, (in whom the estate and interest of John Chawner was then vested,) on the 28th November, 1776, filed his bill in the Court of Chancery for a renewal of the lease of 2d March, 1750; and that Thomas Sadlier, in his answer to that bill, admitted that his father, Charles Sadlier, had, after attaining his age of twenty-one years, by said articles, demised to John Chawner and his heirs, the lands in said articles, and in said indenture of lease mentioned, to hold for the lives therein named, with covenant to renew the same forever; and that, pending the suit, Thomas Sadlier submitted to execute a renewal of the lease on 6th March, 1782, to Thomas Biggs for the three lives therein named, and for such other lives as should forever thereafter be added thereto pursuant to the covenant for perpetual renewal in that lease contained. That at the time of swearing his answer, and also of the execution of this renewal, Thomas Sadlier was fully competent to bind the inheritance by his acts. That the lease was renewed subsequently by indenture bearing date 21st November, 1797, pursuant to the covenant for renewal contained in the articles of agreement and in the lease of 2d March, 1750.

The bill setting forth subsequent renewals, stated: "And plaintiff relies on said original indenture of renewal and agreements, and the several recitals and statements therein respectively contained, as evidence that articles of agreement bearing date 5th January, 1746, contained a covenant for the renewal of said interest forever." The bill, having shown title in the plaintiff and defendant, stated that in or as of Michaelmas term last, the defendant, Thomas Sadlier, brought an action of ejectment on the title to obtain possession of the lands and premises comprised in and demised by the lease of 2d March, 1750; and that plaintiff duly took defence to said ejectment, but, being subsequently advised that the trial at law would be attended with considerable delay and expense, and the plaintiff having recently discovered that Thomas Sadlier the elder, who executed a renewal in 1814, had only a life estate in remainder in the lands and premises, the plaintiff was advised to give a consent for judgment with stay of execution until the 22d May next. That the defendant had accordingly caused judgment to be marked under the consent in that action.

The bill prayed that it be referred to the Chief of Second Remembrancer to take an account of the sums due and owing by plaintiff for rent, and several fines and interests on foot of said lease; and that upon payment thereof the said defendants, Thomas Sadlier and Thomas Sadlier the younger, may be decreed to execute a renewal

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it so — is or not consistent with any other hypothesis than that there was an obligation upon Charles Sadlier to make the lease in question. What is the first thing that we see took place after this instrument of 1750? Charles Sadlier, the party to the deed of 1750, died in 1756 — that appears upon a part of the pleadings in the suit that was afterwards instituted. The first thing that happens is, that two of the lives fell in about the beginning of the year 1769, at the time Thomas Sadlier, who was tenant in tail then in possession, was an infant. An application was made to the Court of Chancery in Ireland, to compel him or his guardian to execute a renewal of the lease. That could have been only upon the footing that, for some reason or other, the covenant bound him. Now, the covenant did not bind him if it was only a covenant by his father as tenant for life; but it did bind him if the covenant was, as it represents itself upon the face of the instrument, a covenant which he was bound to enter into by reason of a prior obligation, which he contracted when he was tenant in fee-simple. It is plain that the view taken by the Court of Chancery in Ireland was that he was bound, because the court ordered the guardian to execute a renewal.

I do not stop to inquire, because I do not think it necessary, into the question of what right there was on the part of the Court of Chancery to order the guardian to execute such an instrument for the infant. I do not think it material for your lordships to inquire into that. I dare say there is such a power, and that it was borne out to be right; but the reason I do not stop to inquire minutely into that is this, that, after that, and some time before the year 1782, another life dropped, namely, the life of Daniel Alt. Now, what were the rights of the parties then, supposing nothing to have happened between 1750 and 1782 except that renewal? Supposing nothing else had happened, we have Thomas Sadlier, the son of Charles — being the absolute owner, for so I must call him, of the property — he was tenant in tail in possession — applied to to execute a new lease in pursuance of his father's covenant, and proceedings were instituted to compel him to do so. It does not appear that those proceedings ever ended in any decree; but, as far as the tenant was concerned, they ended in that which was just as good to him as any decree, namely, in the fact that, somehow or other, he was advised to acquiesce, and, being tenant in tail, he executed a lease pursuant to his father's covenant, reciting it, and treating it as a valid covenant, and as one which bound him. My lords, I have said he was tenant in tail in possession. Now, I am aware of the argument which was pressed upon your lordships, that he was not, they say, really tenant in tail in possession, because he had in the mean time dealt with the property so as to make his position no longer tenant in tail in possession, because it is said he had executed articles upon his marriage. He had, it is true, it appears, executed articles upon his marriage — in the sense that he had signed some paper; but he was an infant at the time, for you find in the proceeding, instituted against him previously to his granting the lease of 1782, a bill being filed against him, he, by his answer, admits that he attained his age of twenty-one

years in the year 1779. Now, the articles are dated in the year 1773; he was, therefore, a minor at that time, and no articles could bind him as to his inheritance at all. He was, therefore, legally tenant in tail subsequently to that obligation, so far as it was an obligation. He had bound himself upon his marriage, by certain articles, to make a settlement upon the property, under which he would no longer have been tenant in tail; but, even if the articles had been executed by him after he had attained his age of twenty-one years, I do not see how they could have affected the case, for we have no evidence of what the articles were, except the memorial — and I do not stop to inquire whether that is legitimate evidence upon the subject or not.

We have a memorial of the articles, which was put upon the register shortly after the execution; and all that appears upon the memorial is, that he had by the articles stipulated to secure a jointure to his wife for the term of 200 years, I do not know what reason, unless, as it appears afterwards, for the securing a portion to his younger children. But all the evidence we have of any articles is of articles which do not affect the ultimate right of the tenant in tail. It appears to be perfectly clear that, being tenant in tail, he executes a lease in 1782 to the owner of this lease, Benjamin Biggs: doing so by a recital which states his obligation to do it by reason of that which had been stated as the obligation in the two preceding instruments, namely, the deed which had been executed by Charles Sadlier in 1750, and his lease of 1770. Well he was, however, tenant in tail at this time — certainly only tenant in tail; but in the year 1795, upon the coming of age of his eldest son, or some time after his eldest son had come of age, he makes a settlement of the property with the concurrence of his eldest son; and, in order to give complete effect to that settlement, he covenanted to levy, and afterwards did levy, a fine, and suffer a recovery to enure to the uses of that settlement, but saving and confirming in words all leases which the parties had perfect power by their settlements to make. Now, I think that, independently of the last statement, it is quite clear, upon the ordinary principle that a party, being tenant in tail, and making a lease for a valuable consideration, and afterwards levying a fine and suffering a recovery, that would enure to confirm that lease, even if there had not been those words; but those words appear to me to put beyond all doubt that it was the intention of the party to confirm it, as far as he was able to do, and that he states such intention. That is the way in which it stands. It is then again renewed in 1814. The result is, that throughout this long period of time, about a century now, and nearly a century when the suit was commenced, the parties have been all dealing upon the footing that one was entitled to claim and the other was bound to make leases, which, if the contention now insisted upon by these appellants were well founded, it would have been always competent for the party that was to grant the lease to have resisted; and it was evidently immensely his interest to do so, because I see by the different instruments the sort of consideration that was paid from time to time.

There is one case in which 5,000*l.* was paid for the leasehold

interest, so that the sum of 11*l.* is wholly absurd, as any thing like the value; and it can be accounted for upon no other ground than that of being bound. It appears to me that there are the most satisfactory circumstances tending to show what the rights of the parties are—there is long enjoyment, the same dealing with the property for a very great period of time, during all of which it was the interest of one party to have resisted that which he from time to time did, whether or not bound to do it by some document which compelled him to do that which the other side insisted upon his doing. All this, therefore, leads me irresistibly to the conclusion that there must have been something which compelled Charles Sadlier, in 1750, to execute that instrument. Now what was it? It is argued that there is no evidence that we can look at as proof of this prior instrument, which is referred to and memorialled; that, because of certain technical reasons, (or substantial reasons, if you please,) it is not to be admissible in evidence. Why not? The covenant in the deed of 1750 is perfectly sufficient, if it is true. Now, in order to see whether it is true or not, I have already looked through all the subsequent transactions; but, if that were not sufficient, may I not look at all the surrounding circumstances attending the covenant, and see whether, conjointly with that or preceding it, there were not circumstances tending to prove the truth of that statement, that he was bound by the prior covenant? I am clearly of opinion that I am so entitled; and if I am entitled to look at every thing which enters into the statement of the circumstances, was the statement contained in the deed of 1750 true? If it was true, what would you expect to find? Why, you certainly would find upon the register a memorial of that old deed, signed, not by Charles Sadlier, the lessor, but by Chawner, the lessee—being, as invariably it is with the lessee in such cases, the purchaser, who registers the memorial, and not the party from whom the estate has passed. If that be so, and that carries it back by the most legitimate course to the memorial, just let us see what it contains. And this brings us to the second point insisted on upon the part of the appellant. It is said, when you look at the memorial of the original instrument, the alleged foundation of the subsequent deed in 1750, you do not find in that memorial such a covenant as the deed of 1750 represented as being made.

I think there are two perfectly sufficient and satisfactory answers to that. In the first place, I do not see any substantial difference between the two. I take it that the memorial is a literal copy for this purpose, a literal copy of the instrument of which it purports to be a memorial. What is it? It is a lease. The parties treat it as an agreement for a lease, at the yearly rent payable so and so, with a clause of renewal after the expiration of such lives, provided Chawner, then the lessee, "his heirs, executors, administrators, or assigns, should, within six calendar months, to be computed from the death of the last of the said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as well all rent and arrears that should be due for the half year after the fall of such life as the sum of 11*l.* 7*s.* 6*d.* for

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renewing or adding such life or lives forever." I read "forever" as coupling it with "of renewal,"—"of renewal," put all the rest in a parenthesis—"after" so and so, and on such terms, "forever." That is the only meaning of the parties—there is no other—the terms are, to renew it forever. There is, indeed, a discrepancy—that must be admitted; for the memorial states, at least it is the inference from it, that there was to be no renewal till after the first batch of lives, the whole of the first three, had expired. It might be that the parties might stipulate that the renewals should take place upon these terms, namely, no renewal till after the first three lives, and then a renewal upon the falling of every life afterwards. It might be so; but I do not believe that was the meaning. If it was, however, that is immaterial now; it only shows that at the first renewal, when only two lives had fallen in, the parties were renewing when they were not bound to renew; but that does not interfere with what happened afterwards, when, under the terms of this deed and the covenant expressed in 1750, the parties were, from time to time, parties to the renewal. Therefore, it appears to me, for all practical purposes, that there is no substantial, or indeed any difference whatever, between the covenant stated in the memorial and the covenant stated in the deed of 1750.

But I think there is another perfectly satisfactory answer to this part of the case, namely, that if there is a discrepancy, which am I to choose between? The parties have been acting upon the covenant as if the covenant, as represented in the deed of 1750, was a correct covenant. Is that so? Suppose, for a moment, there is a difference; I say there is no doubt, then, it is perfectly competent to me to say that I believe that is the covenant, and not the other. Mr. Palmer, in arguing this case, supposed that by so doing we were militating against the rule, which is a perfectly well established rule, and consistent with very good sense, and which was reasonably established in the case of *Baynham v. Guy's Hospital*, overruling that case sent for the opinion of the Court of Queen's Bench—namely, that you cannot construe a deed by the acts of the parties. Certainly not; that is to say, if there is a deed which says according to its true construction one thing, you cannot say that that deed means something else, because the parties have gone on for a long time so understanding it. But what is this instrument here? It is a memorial—that is, in the nature of an abstract or a representation of the parties of what the covenant was; and, when I see that the effect of it is represented as being such as it is represented to be in the deed of 1750, four years afterwards, and always acted upon in the later ones, the inference I arrive at in point of fact is, that it is not correctly represented in the memorial; that, if there be a difference, the memorial has inaccurately stated that which has been more accurately stated in the deed of 1750, when the parties were to act upon it, and which has been acted upon invariably ever since. Upon these grounds, it appears to me perfectly clear that the judges in Ireland arrived at a satisfactory conclusion, when they came to the result that these gentlemen, the Bigges, were entitled to renewal of this lease upon the terms of the

deed as they ask it. I should notice that the rent, as stated in the memorial, is different from the rent now; but that is all explained in the deed of 1750, because it seems the memorial, in reciting the subject-matter of demise, comprehended certain acres, called Butler's Acres, which had afterwards lapsed, and then, that some reduction was made in the rent. Then, the only other question raised, — indeed, I believe it has been abandoned, I think it was waived, — was, whether a sub-denomination, called Gurtmungagh, was included in the lease. It is perfectly clear that it was so; the master has found, upon evidence which satisfied him, and there is no objection to that. Upon the whole, I am clearly of opinion that the judgment of the court below was perfectly right, and shall move your lordships that it be affirmed.

LORD ST. LEONARDS. My lords, I entirely agree with my noble and learned friend in the conclusion at which he has arrived, and I think it only necessary to look at the circumstances connected with the deeds, in order to show that there is really no question to be discussed. The whole case shows that there is no point to be decided after the facts stated by the appellants. The points made before your lordships have been: first, with reference to the evidence of the memorial of 1746, that is, the operation of that evidence; secondly, as to the construction of the covenant for renewal stated in the memorial, contrasting that with the covenant contained in the lease of 1750 — the appellants insisting that, in consequence of the discrepancy between the two covenants, the one must have been released and a new obligation created by contract between the parties; and the further point, that, at the different times when the leases, six I think in number, successively were granted, the persons who granted them had not a sufficient estate to bind the inheritance of the present appellants. I think those are the points. Now, it is made a great question in reference to the memorial, which is signed only by the party who takes the interest, whether that of itself, by its own force, shall be considered as binding the estate of the grantor. That is a totally different question from that which is now before your lordships, because here the question is, whether or not that memorial can be considered as secondary evidence of the contents of the instrument of 1746; and, considering the length and position of the deeds by which it has been recognized, and considering the statute itself under which that memorial was enrolled, and the proof which accompanies that memorial, and bearing in mind that of course every memorial, speaking generally, is signed by the person who takes the interest, because it is he who wants the protection of the register and not the grantor, I certainly am of opinion — and I think the authorities would not bear against that view — I am of opinion that this memorial is good secondary evidence of the contents of the deed of 1746, it being proved, upon search, that that deed has actually been lost.

It is not necessary to go through the cases. *Scully v. Scully* was referred to. I was myself counsel in that case; and I see it mentioned in the margin of the cases cited in this case, but without refer-

ence to that question, which, therefore, I must take for granted — I have very full notes upon the argument, not here, but I have them at home, very full notes of the argument upon both sides — I must take it for granted that that question was not seriously advocated, because I think I should have noticed it as one of the points which had been seriously discussed and decided upon, if it had been. If you look at the register of the memorial, you will find a witness, according to the requisition of the Stamp Act, expressly swearing that he is a witness to the deed itself, “that he saw the above-named parties duly perfect the same, and that he saw the said John Chawner duly execute the above memorial,” and that his name was put as a subscribing witness, and that he delivered it to the registrar on the 7th January, 1746; so that you have an affidavit put upon record, under the authority of the act of parliament, of the memorial necessary to secure the title of the person taking from the grantor; and, as to the actual execution of that deed, which is no longer forthcoming, that is proved by evidence taken in the course of the case. Then the question is, the deed being lost, and the possession having always gone according to that deed for a century, whether or not that memorial is secondary evidence of its contents. I confess I should be ashamed of the law of England, if such evidence as that were not received from necessity, as secondary evidence, under the circumstances. But this case does not depend upon that mere question of secondary evidence. At the same time, however, I must point out to the appellant that his argument entirely bears against himself, because, unless he can set up the articles of 1773 against the lease of 1782, he has not a shadow of a case to rest upon — not a shadow. Well, then, his only proof of the articles of 1773 is by a memorial of exactly the same tenor as the memorial of the deed of 1746; and, therefore, if he were to prevail upon that point, he could not at all remove the force and validity that the lease of 1782 has against the supposed articles of 1773, for he would then remove by his argument entirely those articles, and, consequently, there would be nothing to set against the validity of the lease of 1782.

His argument, therefore, unfortunately is a two-edged sword, and, whilst it may defeat his adversary at one time, it destroys himself at another. Now, it is said that the lease of 1750 was for the same lives as the lease of 1746 — that is accounted for; but it is said, you must suppose it was a new contract, because there were the same lives — that the renewal was before the dropping of the lives. The lease itself explains why that took place. The lease had fallen in of Butler’s Acres; there was, consequently, a division of the property, and it became necessary to have separate leases. That, therefore, accounts for what I may call the repetition of the lease of 1746 in that respect, by a demise for the same three lives. That was the ground why that lease was executed. Well, then, there was a solemn lease executed, reciting that instrument of 1746, not in terms exactly altogether; but what has already been stated by my noble and learned friend is conclusive to my mind, that the memorial does not profess to be an exact copy of the covenant — it would not be required to be

an exact copy of the covenant under the act of parliament — but it is a general statement of the effect of it. When I see that covenant of the instrument of 1746 intended to be carried into effect by a person having an estate of no great value — a life estate, I will assume, in the property only — but who had an estate of inheritance at the time he executed the deed of 1746, I must take for granted that what I find upon the face of that deed is a true exposition of the meaning of the covenant of that deed of 1746, which is no longer forthcoming. From that time, 1750, down to 1853, I may say, every renewal has been based upon that instrument of 1750.

But, then, it has been said at the bar, that you cannot possibly give a specific performance upon the lease of 1750, because it would be contrary to the decree, which is for a lease according to the instrument of 1746 and of 1750, and, therefore, you cannot exclude the deed of 1746. That depends entirely upon the state of the pleadings, I understand. Originally, the bill asked for a specific performance of the covenant for renewal in the lease of 1750. To that it was objected that at that time the grantor was the tenant for life. Then, the bill was amended, and the lease or articles of 1746 were put in issue. Then, of course, the decree was valid. But there is nothing, according to the principles of courts of equity, which, if this objection were to prevail, would prevent a court of equity from giving, if they thought the circumstances warranted it, a specific performance according to the contract of 1750. Now, if we trace the different leases and the times when they were granted, there may be a question, which it is not worth entering into, how far those leases would have bound the inheritance, independently of the deed of 1746, in consequence of the limited nature of the estate of the persons who granted the leases. But let us come down only to that transaction of 1770, when the lease was renewed under the authority of the Court of Chancery in Ireland. That was an application which was warranted by the act of the 11 Queen Anne, the Irish Act, which authorized guardians to grant renewals of leases for lives as the representatives of persons under disabilities. That was executed under the authority of the statute by the direction of the Court of Chancery, after an examination of all the facts. It is clearly impossible at that time, from the most ordinary view of the care taken in such cases, but that the whole title must have been investigated; and, at that time, for aught I know to the contrary, the deed of 1746 may have been produced; and I should suppose, and if I had to direct a jury, I should tell them to presume, that the deed of 1746, if nothing appear to the contrary, was before the master and before the court, because the lord-chancellor did, during the infancy of Thomas Sadlier, direct his guardian to execute a renewal of that lease, and that lease was accordingly renewed. Can your lordships have a doubt when the facts must have been known so much better then than they can be now, when another half-century has elapsed, — are we now called upon to presume that that was wrong which was then held to be right — are we not to presume that that which was considered then right must be

now right, when by certain lapse of time the instrument has been lost, which then might be forthcoming?

To my mind it is perfectly satisfactory, that at that period the Court of Chancery was satisfied that it was duly executing the power given to it by the statute, in directing the infant tenant in tail to dispose of his valuable inheritance by a lease for three lives, under a specific covenant for renewal at a very small fine. Well, then, the inheritance was parted with—and parted with, that is, the *quasi* inheritance for three lives—was parted with under the authority of the court. Now, without troubling your lordships, after the full opening of my noble and learned friend on the woolsack, on this case with any devolution of title, which is unnecessary, I come at once to that which of itself would form just as good a title, in connection with the former deeds, as any man ever possessed to any estate in this country. The lessee, Biggs, who claimed under the original lessee, Chawner, filed a bill, I think in 1776, for a renewal of the lease. Now, Thomas Sadlier, in answer to that bill described as the tenant for life, does not raise these objections at all; he raises a collateral issue with reference to whether some property that was in dispute, which had formerly fallen in, was renewable or not. And he says by his answer that, if he is forced to give a specific performance, he trusts it will be only upon the terms which he mentions with reference to that collateral issue; but, in his answer, he does distinctly admit, without the slightest qualification, the deed of 1746; he admits the deed of 1750, and the other renewals, and in no respect attempts to impugn them. Well, what can be said of such things? Suppose it did not bind the inheritance, surely it is *res gesta*—it is a statement by a man deeply interested, who was called upon to renew, who would lose the benefit of the estate for his life, and whose children would be bound by the renewal unless they could impeach it. Instead of going to a decree, what does he do? He does not at all attempt to consider that a decree was necessary; for you find the first deed that was executed between these parties, and which in point of fact put an end to the suit, recites that the deed is between Thomas Biggs, of the one part, and Thomas Sadlier, of the other part: “Whereas a suit was some time since instituted, by George Biggs, of Bellevue aforesaid, Esq., father of the said Thomas Biggs, party hereto, against the said Thomas Sadlier, party hereto, in order to enforce a renewal of a certain lease for lives renewable forever of the lands of Bellevue, otherwise Ballyguider, in the county of Tipperary aforesaid, in which several proceedings were had; and, pending such proceedings, all the estate, right, title, and interest of the said George Biggs of, in, and to said lease and the premises thereby demised became vested, and are now vested, in the said Thomas Biggs, party hereto; and, whereas it hath been agreed upon by and between the said parties to these presents, that the said lease should be renewed in the usual and ordinary manner; and, in case the said Thomas Biggs should be dispossessed of any of the said lands, in consequence of a claim made by one Augustine Duggan, and to support which claim a bill was filed by the said Duggan,”—then the

rent was not to cease; but the tenant was to have compensation; and then, in consideration of a certain sum of money, there being a dispute about timber, Sadlier conveyed to Biggs the timber standing upon the estate.

Now, that is on the 6th March 1782, there is to be a renewal "in the usual and ordinary manner,"—no longer any dispute about the deed of 1746, or the interest, or whether the inheritance was bound or not; but this person, in possession of the estate, entitled to the enjoyment of it for his life, and afterwards his children, consents to execute, "in the usual and ordinary manner," a renewal. Then you will find the lease in question was made on the same date—the 6th March, 1782—between Thomas Sadlier of the one part, and Thomas Biggs of the other; and there is this recital: "Whereas the right of renewing the annexed indenture of lease is now legally vested in the said Thomas Sadlier; and whereas the right of renewal and benefit of the said annexed lease is now vested in the said Thomas Biggs." Therefore, there is a renewal, the lease granted to Biggs by Sadlier, without the slightest dispute or doubt about the title. Now, it is impossible that any thing can be more conclusive than that; because, if I were to put it upon the ground that the persons cannot be bound who have granted those leases, yet you would find it is impossible to affect a lease granted with the full knowledge of all the circumstances which this party had, and after litigation, where his concurrence is afterwards had or is deemed necessary, in subsequent settlements, or where he himself afterwards makes the settlement. Now, as I understand—though there are so many Thomas Sadliers, I think there were four of them in succession—but this Thomas Sadlier, as I understand, was the grantor in the supposed articles of 1773; and he was the grantor, I suppose, in the settlement of 1784. I have not the dates. [*Glasse.*—Yes; he was, my lord.] Then I must assume Thomas Sadlier at that time to be entitled to the inheritance—he is dealing with it, and the inheritance is claimed under him. I cannot, therefore, see where the question is. Now, supposing these deeds are dated in 1782, then it is said there is the prior settlement of 1773; that is, that marriage articles were signed. Now the only evidence of that lying before me at this moment is the memorial to which I have already referred. If the objection against the memorial of the deed of 1746 should prevail, then *cadit questio* as regards those articles—they cannot be read.

But I will assume that they can be read. Now we have nothing but the articles to go by. The articles are simply and only to provide a jointure of 100*l.* a year for the wife for her life, for which the estates are placed in the hands of trustees as a security. That does not affect the lease of 1782 at all. And when you come to the settlement of 1784, which of course cannot bind and overrule the lease of 1782, I noticed, during the argument, that there is a curious recital there, as if they wanted, if possible, to make a foundation of something to rest their settlement upon. They recite it in this way: "That by the indented articles of agreement made on the 19th February, 1773, between the said Thomas Sadlier, party to these presents

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of the one part, and the said William Woodward the elder, and said Rebecca, by the name of Rebecca Woodward, eldest daughter of the said William Woodward, of the other part,—whereas a marriage is intended to be had and solemnized between the said Thomas Sadlier and said Rebecca, now his wife; he, the said Thomas Sadlier, in consideration of the said then intended marriage, and of the sum of 500*l.* sterling, by the said William Woodward the elder, covenanted to be paid to said Thomas Sadlier, and for other the considerations in said articles mentioned, doth covenant and agree with the said William Woodward, the elder, his heirs, executors, and administrators, that he, the said Thomas Sadlier, will settle and convey the several lands therein mentioned, and expressed as near as may be in reference to the parties concerned in such settlement who shall be living at the time of the making thereof.” Well, I do not perceive from the evidence that I have, that what is there mentioned as expressed and contained is in the memorial on your lordships’ table; that memorial is strictly confined to what I have told you, namely, providing a jointure for the intended wife. Well, then, it is said that, as the lease in 1782 was prior to the settlement of 1784, it binds everybody claiming under that settlement of 1784. Well, that is the question; and then, if you were to follow this up, which it is really a waste of time to do, you find they have continued executing settlements and renewing leases, from time to time, down to 1814, and always in terms and in connection almost, as it were, with the settlement, when it is utterly impossible that the persons granting those leases should not have been aware of the nature of the acts they were doing; and in every one of them it is remarkable, without exception, every man who grants a lease assumes to have an inheritance to enable him to do so; and therefore a more scandalous fraud could not have been committed than would have been committed upon those lessees, if the title could be impeached in the way suggested. But then the settlement of 1784 does most expressly except, in making that settlement, all leases; it excepts particularly all leases which were *bond fide* leases of any part of the property. Then he knew perfectly, of course, that he had two years before granted that lease after a litigation; clearly, therefore, there was no surprise.

This was after a long litigation of several years—it was the termination of the litigation—it was the completion of it—it was in lieu of it—indeed, he became his own chancellor, and finding that he had no merits, he submitted to that which was clear against him; and then, having executed a lease of the property, upon his marriage he takes care not to leave himself open to any claim for damages by those who claim under him, or his children, or grandchildren, and other parties, and his intended wife, because he says, “I convey this estate to you subject to any leases *bond fide* made.” These were *bond fide* beyond all question, and, therefore, he conveyed the estates expressly subject to the leases of 1782. My lords, the only other question, if question it can be called, is whether, if you are to go back and rely upon the lease of 1746, there was or was not a covenant for perpetual renewal.

Sadlier v. Biggs:

Why, you must reject those words "forever" — they come in awkwardly enough, I admit, — but you must reject those words "forever," if you say there is not a covenant for perpetual renewal. I asked in vain of the learned counsel, who is very competent to give an answer, what sense was to be attributed to the words "forever," if that was not their meaning. Can you reject them? Can your lordships be called upon, as a court of equity, to reject these large words, expressive beyond all others that the English language contains? There is no other word so competent to express what the parties intend, that this lease is to be renewed forever — the fines are to be paid forever. Suppose you define it in that way, that the fines are to be paid forever; then that must be, of course, in consideration — of what? Why, renewals forever, because fines are only to be paid upon the renewals. If, therefore, you believe that these fines were expressly stated as a perpetual payment of fines, that of itself implies a perpetual renewal, upon which alone those fines could be paid. Another case was cited, upon which I will not detain your lordships for a moment, namely, *Baynham v. Guy's Hospital*. Without saying whether that was right or wrong, I do not think it has any bearing upon this case. The proviso in that case showed that the parties did not intend to go beyond the lives. That is a case only confined to lives, and has no bearing upon this case before your lordships, because the case of *Baynham v. Guy's Hospital* simply was whether or not, upon the due construction of the covenant, there was any thing more than a covenant for the further assurance of the lease which had been granted.

My lords, I have occupied, I am afraid, more time than the case deserves; but, upon the whole of this case, I never entertained a clearer opinion in my life than I do in this instance; and I have the satisfaction of agreeing with my noble and learned friend in coming to the conclusion that the justice of the case is in all respects met by the construction which has been put upon it by the court below. With regard to costs, there cannot be any sort of doubt that the question raised upon this appeal ought never to have come to your lordships' house. I, therefore, entirely agree with my noble and learned friend that the judgment of the court below should be affirmed, and I recommend your lordships that it should be affirmed, with costs.

The LORD CHANCELLOR. I entirely concur in the remarks of my noble and learned friend, that this is a perfectly clear case, and that the parties who have unnecessarily brought this appeal, ought to pay the costs, and more especially when we see that it was brought against all the previous experience as to the position of this property, and intended to disturb the possession which has existed for nearly a century.

*Decrees affirmed, with costs.*

C A S E S

ARGUED AND DETERMINED

IN THE

COURTS OF CHANCERY;

DURING THE YEAR 1854

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*In re* THE WINDING-UP ACTS, AND *in re* THE DOVER, DEAL, AND BRIGHTON JUNCTION RAILWAY COMPANY; *Ex parte* CAREW AND OTHERS.

March 2, 11, and 16, 1854.

*Winding-up Acts, Practice under — Notice of Motion — Staying Proceedings under Winding-up Order.*

The circumstance that an order goes beyond the notice of motion on which it is made, however immaterial as between those who have appeared and taken part in the discussion upon the motion, is not so as to those parties interested in the subject-matter of the motion, who, being served with notice thereof, did not appear thereon, for these are entitled to rest on their right to assume that nothing beyond what is contained in the notice will be asked upon the motion. Therefore,

Where, in the course of the proceedings under an order for winding up the affairs of an abortive railway scheme under the Winding-up Acts, the master to whom the matter was referred had made a call upon a portion only of the persons whose names had been settled on the list of contributories to the liabilities of the concern, on the ground that that portion were the parties primarily liable; and motions were made by some of those parties, by way of appeal, that such order might be discharged or varied, and that the names of the parties so primarily charged might be struck off the list of contributories, notices of which motions were served upon all the contributories on the list; and, upon the hearing of such motions, the Vice-Chancellor, being of opinion, upon the evidence, that no such company or association had in fact been constituted, made an order, not only discharging the call in question, but also staying all proceedings under the winding-up order, and directing the official manager to repay all sums received by him thereunder to the persons respectively from whom he had received them:—

*Held*, upon appeal from the Vice-Chancellor's order, that inasmuch as some of the parties served with the notices of motion had not appeared upon such motions either before the Vice-Chancellor or before the Court of Appeal, and inasmuch as the creditors who had

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<sup>1</sup> Before the Lords Justices the Right Hon. Sir JAMES L. KNIGHT BRUCE and the Right Hon. Sir G. J. TURNER.

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*Ex parte. Carew.*

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proved debts under the winding-up order, not having been served, were also absent, the order staying all proceedings under the winding-up order could not stand, and that therefore the Vice-Chancellor's order should be discharged *in toto*; but that, inasmuch as the materials before the court did not appear sufficient to support the master's order for a call, there should be substituted for the Vice-Chancellor's order so discharged a simple order discharging that made by the master for a call, and giving all parties their costs out of the estate.

THIS was an appeal of the official manager from the decision of Sir J. Stuart, V. C., (reported 18 Jur. 52; s. c. 23 Eng. Rep. 77.) The facts were as follows: The company was projected in 1845, and provisionally registered in that year under the title of "The Dover, Hastings, and Brighton Junction Railway Company," the capital to consist of 300,000 shares, of 20*l.* each, with a deposit of 2*l.* 2*s.* per share. The subscribers' agreement purported to be made between the subscribers who had executed the agreement, being severally subscribers to the undertaking, of the first part, the trustees of the second part, and fifteen persons (one of whom was a Mr. Frewen) as managing directors of the third part, being described also as "being some of the parties hereto of the first part;" and it contained (*inter alia*) a provision that the holding of not less than forty shares in the concern should be requisite as a qualification for being a managing director, and a covenant by the parties thereto of the first part to indemnify the managing directors of the company, and each and every of them, from all expenses to the payment of which they had or might become liable in respect of the formation and establishment of the company, and that the deposits paid by the respective parties thereto of the first part should be charged with and applicable to the payment of such expenses. It was provided also that the managing directors should have power to dissolve the company, if they should deem it expedient, at any time before an act of parliament should be obtained, and that thereupon the surplus of their deposits, after deducting therefrom a proportional part of the expenses incurred by the managing directors in endeavoring to establish the company, should be returned to the respective subscribers. The deed of settlement was signed by nineteen subscribers, as parties thereto of the first part, between the 22d October and the 4th November, 1845, the aggregate number of shares taken by them being 450, upon which the deposits were paid by them. The deed, however, was not executed by the trustees, or anybody as parties thereto of the third part; and it appeared in evidence, that on the 11th October, Mr. Frewen had been requested by one of the solicitors of the projected company to execute it, but refused, and desired that his name might be struck out. Certain persons, however, though they refused to sign the agreement, and also refused to take shares, had nevertheless acted as a managing committee of directors of the company, and to their account with their bank the deposits in respect of the shares taken by the subscribers who had signed the agreement had been paid, and afterwards all drawn out by checks. Mr. Cory, one of these managing directors, having been sued by the secretary and surveyor, and been compelled to pay their demands, petitioned for the usual order to wind up the affairs of the company under the Winding-up Acts,

*Ex parte Carew.*

which was accordingly made on the 6th August, 1849. The master, in 1851, settled the members of the provisional and managing committees, (but not Mr. Frewen, who was discharged,) and the allottees and subscribers for shares who had paid their deposits and signed the deed, upon the list of contributories. On the 24th June, 1853, a meeting was held before the master, notice of which had been served upon the persons who had acted as managing directors, and also upon the subscribers who had signed the deed of settlement; and at that meeting, after an argument on behalf of the managing directors on the one hand and of the subscribers who had signed on the other, the master held the latter, by reason of their covenant to indemnify the managing directors, to be the parties primarily liable to the expenses and debts incurred in the attempt to establish the company, (a large amount of which had been proved in the master's office,) and to the costs of winding up, and accordingly made a call upon them of 1*l*. per share to liquidate those expenses and costs. Three motions, by way of appeal from the master's order, asking that it might be discharged or varied, or else that the parties moving might be at liberty to appeal from the master's settlement of the list of contributories, whereby they had been settled on such list, were made by Mr. Carew, Mr. Hay, and Mr. Bohn, three of the subscribers who had signed the deed of settlement. Upon the hearing of these motions on the 25th November, 1853, Sir J. Stuart, V. C., gave leave to the contributories settled upon the list to apply to have their names struck off such list; and notice of motion to that effect having been given, that motion, as well as the three original appeal motions, was heard by the Vice-Chancellor on the 1st December, 1853, who thereupon, on the 17th January, 1854, made the order now appealed from, viz: that the master's order for a call be discharged; that all proceedings under the order for winding up the company should be stayed; and that the official manager should repay all sums of money received under that order to those from whom he had received them, with power to the official manager to make such application as he might be advised, as to his remuneration and costs.

*Roxburgh* appeared for the official manager, in support of the appeal.

*Malins, Q. C., Chandless, Q. C., Daniel, Q. C., Dickinson, Chichester, W. H. Terrell, Selwyn, H. Stevens, C. Hall, and W. W. Mackeson*, for various contributories and managing directors.

*March 11.* KNIGHT BRUCE, L. J. We are both of opinion, that, under the particular circumstances of this case, it will be convenient and right wholly to discharge the order appealed from. Whether any portions of it will or not be repeated in the order which we shall ultimately make, will depend upon the consideration to be given to the case, with the aid of M. Roxburgh's reply, which we will hear on a future day, and which will be addressed to the ques-

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tion of what order ought to be made in substitution of the one discharged.

*March 16. Roxburgh,* in reply, upon the order to be substituted, submitted that each of the managing directors, having acted under the deed of settlement, should be treated as having signed it in respect of forty shares, and their names added to the list of contributories as primarily liable in respect of that number of shares; and that then a call of 3*l.* per share should be made upon all the contributories upon the list so settled, credit being given to the subscribers whose names were already placed on the list for 2*l.* per share, which had already been paid by them. That would probably be sufficient to discharge the liabilities of the concern, and the costs of winding up; but if not, then that the deficiency should be paid by means of a ratable call upon all the contributories finally settled on the list.

KNIGHT BRUCE, L. J. Three motions in this matter, on the part of different persons, coming on together in 1853, I think, and in the present year, before one of the learned Vice-Chancellors, produced the order now under appeal, which was made in January last, I think — an order, the result certainly of an earnest, and, I may perhaps be permitted to add, a most laudable desire on the part of the learned judge to end a vexatious and harassing litigation, by doing final and complete justice to and upon all unhappy enough to be concerned in it. In the way of this, with such materials as his Honor had to deal with, there were great difficulties, which he thought not insurmountable. I have tried to think so, but have not been able to persuade myself of it. His Honor has directed a stay of all proceedings under the order made in August, 1849, which, directing the company or association, or inchoate company, now before us, to be dissolved and wound up, was under the statutes of 1848 and 1849, or under the former of those statutes, the origin and foundation of the court's jurisdiction to hear the motions. But no such thing was asked by the motions, or by any one of them; nor has the order of 1849, so far as I am aware, been ever sought to be discharged. It remains in force, subject only to the stay, or partial stay, caused by that under appeal. Now, the mere circumstance that an order on a motion goes beyond the terms of the notice, may be immaterial as between those who have taken part in the debate, or appeared upon it. Not so, I apprehend, as to persons interested, who, served with the notice, have done neither, but rested on their right to assume that nothing beyond the notice would be asked or done. This consideration seems of itself fatal to the order of January last, for, as I understand, some persons interested in the subject, who were properly and necessarily served with the notices of motion, or one of them, did not appear before the Vice-Chancellor, and of these, some at least, I believe, have not appeared before us. If all served had, however, appeared, still, I should respectfully have dissented from the order, for more than one reason; not only because there was and is an

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insufficiency of evidence to support it; not only because, upon the materials before us, it seems to deprive Mr. Cory, who in 1849 obtained the original order, of a provision for rights which at present there seems ground for holding him entitled to demand some provision for, but also because certain persons, who, as creditors, have proved debts in the master's office under that order, having not been served with notice, have not had an opportunity of contending that the ordinary course of proceeding under it ought not to be interrupted, restrained, or varied. The question is, not whether they could successfully so contend, nor whether they have or had an interest in the contention — it is, whether an order such as that of January could have been made without affording them an opportunity of being heard; and I think that it could not. Neither have they, on the present occasion, been served. It has been insisted, on the part at least of one respondent, Mr. Darrell, that the only appellant here, the official mannager, had no title to appeal, and is without a standing place. To this argument I have been unable to accede. He was, I believe, served — necessarily served — with the notices of motion; appeared and addressed the court on them, as it was his right and his duty to do; is affected by the order which he appeals against; and if we should assume that it provides sufficiently for his costs and remuneration, as far as merely his personal interest is concerned, although I do not so assert, still, he is directly interested in its regularity or irregularity, supportableness or unsupportableness, and his right to bring the entire appeal here, as to the entire case involved in the order, was and is, in my judgment, clear and unquestionable.

But Mr. Darrell's learned counsel have also argued that the appeal is barred by lapse of time; and it is true, I believe, that when Mr. Darrell was served with notice of the appeal motion, more than three weeks from the day of making the order of January had elapsed. But the notice was served earlier, and in due time and manner, on those whose motions the three original motions were, and that, in such a case at least as the present, was sufficient to save the lapse, it having been the act of ourselves to require service on others. This objection also, in my opinion, fails. These are the reasons of which I reserved the statement when on the 11th of the present month we informed counsel that we should discharge the order of January, and hear the reply as to the nature of the order to be substituted for it, which now we have done; and we have come to the same conclusion as the Vice-Chancellor, respecting the call, namely, that it cannot stand. The materials before the master were not, nor are those before us, sufficient, as I conceive, to sustain it, made as it was exclusively on those who had actually executed the deed constituting, or intending or professing to constitute, this company or association; and in saying exclusively, I do not intend to intimate an opinion whether, on these materials alone, it would have been or can be properly made upon any of them at all. The covenantors in the deed are the parties to it of the first part, but they covenant to indemnify those only who were or should become "some of the parties to it of

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the first part," and so liable to the covenants, not less than the other parties of the first part.

Again: upon the evidence as it stands, Mr. Frewen was untruly represented to the actually executing parties to the deed as a managing director; nor do I see at present any thing enabling me to say either that this misrepresentation was immaterial, or that they had not a right to charge with some at least of those who were, in truth, managing directors, and to have them dealt with accordingly. Perhaps additional evidence may hereafter be brought forward. At present, the proper order to substitute for that of January seems to me to be to discharge the call, and to give all parties their costs of the motions before the Vice-Chancellor, and here, out of the estate. Thus far, I think, we may go, without requiring service upon the creditors. It will not be necessary, probably, to give in terms any leave for any person to go before the master again as to the call or otherwise, for I apprehend they will have that right by the course of the court. At all events, I believe that is what my learned brother considers right.

TURNER, L. J. I have nothing to add to what my learned brother has said in this case. I certainly should have been very glad if I could have found any way to support the order made by the Vice-Chancellor, for by that order he has discharged the call which was made in June, 1853; has directed all further proceedings in the matter to be stayed; ordered the official manager to refund the money he has received; and given liberty to the official manager to apply with respect to his costs. The first difficulty on this order, as it appears to me, is this — a number of creditors have proved their debts in the master's office, under the winding-up order, to the amount of some 1,700*l*. Now, it may be quite true that those creditors may not have a right of themselves to apply to this court for the purpose of having their debts paid out of the estate, but it is equally clear that every shareholder, or contributory to the company, has an interest in those creditors being paid; because each of those creditors may undoubtedly institute proceedings against some, or either of the contributories for the purpose of recovering their debts, and it is a necessary element in the winding up that those creditors should be paid in some way or other. If we had got before us every contributory, it might be possible that they might say, as among themselves, "We will make arrangements for the payment of the creditors, and stay all proceedings for winding up." But then all the persons who are contributories are not before the court on the present motion, and therefore their interest in respect of the payment of the debts will, in truth, be entirely disregarded if this order be maintained. Again: it is not only the persons who are liable for the debts of the company who are contributories, but persons also who have made overpayments on account of the company, and have a right to have their shares and interests that they have overpaid ascertained. But we have nothing here to show that some of those persons, who do not appear on the present occasion, may not have a right to receive back

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Boyse v. Rossborough.

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some moneys which they may have paid on account of the company. It seems to me, therefore, that the order made in the absence of the parties interested cannot be maintained.

It was said that the official manager would represent either the creditors, or the absent shareholders; but I apprehend the official manager is in the nature of a trustee. It is his duty to see that all the proceedings under the winding up are regular, and to attend the court for the purpose of informing the court, and taking care that proper orders are made in these cases. I think, therefore, that the order of the Vice-Chancellor cannot be maintained. I should have been very glad, indeed, if I could have seen my way to declare the rights and liabilities of these parties, in order that directions might be given for winding up; and I have looked at the case with that view; but I confess, that, upon the state of the evidence before us, I do not see my way to that declaration; for I do not see how the different parties have concurred in the course which has been taken. The liabilities of the one and the other depend upon the acts which have been done by them. I am afraid that nothing can be done but to discharge the order for the call, and to discharge the order made by the Vice-Chancellor.

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BOYSE v. ROSSBOROUGH.<sup>1</sup>

January 18, 19, and 25, and February 11, 1854.

*Jurisdiction — Equity — Establishing Will against Heir at Law.*

The jurisdiction of this court in establishing a will against an heir at law is not limited to cases of a devise upon trusts, but extends likewise to cases of a simple legal devise.

THIS was an appeal from a decision of Sir W. P. Wood, V. C., overruling a demurrer. The bill alleged that Cæsar Colclough, late of Tintern Abbey, in the county of Wexford, and of Boteler House, in the county of Gloucester, being seised of considerable real estate in Ireland, and of the mansion-house, premises, and lands called Boteler House aforesaid, in fee-simple, and of personal estate to a considerable amount, duly made and signed his last will, dated the 6th August, 1842, and thereby gave and devised all his real and personal estate to the plaintiff, her heirs, executors, administrators, and assigns, to and for her and their own absolute use and benefit, and he appointed the plaintiff executrix of his will: that the testator died on the 23d August, 1842, leaving the plaintiff, then his widow, him surviving, who duly proved his will. The bill then stated a settlement, dated the 6th January, 1846, made upon the marriage of the plaintiff with

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<sup>1</sup> Before the Lord Chancellor, (LORD CRANWORTH,) and the Lords Justices.

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Boyle v. Rossborough.

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the defendant Thomas Boyle, by which the premises called Boteler House were conveyed to trustees, (who were made defendants,) upon certain trusts, for the plaintiff. The bill then stated that the defendant, Mary Grey Wentworth Rossborough, alleged that she was, at the death of the testator, and that she is now, the heiress at law of the said testator; and that in the month of September, 1849, the said Mary Grey Wentworth Rossborough and her husband filed their bill in the Court of Chancery in Ireland against the present plaintiff and her husband, stating the will of the said testator, and charging various matters and things to show that the said will was wholly void, by reason of the mental incapacity and unsoundness of mind of the said testator, and also by reason of undue and improper influence at the time of the execution of the said will; and charging that, the said testator having died intestate, the said Mary Grey Wentworth Rossborough, as heiress at law, and Thomas Rossborough, as her husband, were entitled to the real estate of the said testator; and it prayed that the said will might be set aside and declared void. Upon that cause coming on to be heard, an issue *devisavit vel non* was directed to be tried before a jury of the county of Wexford. The issue was tried, and a verdict was found against the will. The plaintiff, (the defendant in that suit,) then applied to the Court of Chancery for a new trial, but the application was refused, and a decree was made declaring the invalidity of the said will. From that order refusing a new trial, and the decree, the present plaintiff has appealed to the House of Lords.

The bill then stated that the plaintiff was in possession of the said mansion and premises called Boteler House, and also of the personal estate, and that no attempt had been made to impeach the will, so far as related to the personal estate; but that the defendants, Mary Grey Wentworth Rossborough and her husband, allege that the said will is invalid, and that the said testator died intestate as to the said mansion and premises called Boteler House, and that the said Mary Grey Wentworth Rossborough is entitled to the same as heiress at law, and they claim the same accordingly, "but they refuse to take any proceeding in the courts of this country, for the purpose of determining the validity or invalidity of the said will, or of obtaining possession of the said mansion-house, lands, and premises; and they desire and intend to delay such proceedings until the witnesses by whom the plaintiff might establish the validity of the said will, many of whom are advanced in age, shall have died, or shall have removed from the country, in order that the plaintiff may be deprived of the benefit of such testimony." The bill further stated that the other defendants, the trustees of the settlement made on the marriage of the plaintiff with her present husband, were unable, by reason of the claims of the defendants, Mary Grey Wentworth Rossborough and her husband as aforesaid, to execute the trusts of the settlement, and that they required the said will to be established. The bill prayed that the said will might be established, and that it might be declared that the mansion-house, lands, and premises called Boteler House, passed under and were devised by the said will, and are now subject

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to the said indenture of settlement of the 6th January, 1846, &c. To this bill, Mary Grey Wentworth Rossborough and her husband demurred for want of equity. The short question was, whether the Court of Chancery had jurisdiction to entertain a bill by a legal devisee of real estate, under a will which did not contain any trusts affecting the real estate, against the heir at law of the testator, to establish the will. Sir W. P. Wood, V. C., decided in favor of the jurisdiction, and overruled the demurrer; and the heiress at law now appealed from that decision. The question is one of such vast importance to the profession, the decision being contrary to what has been the very generally received notion of equity pleaders, that the judgment of the Vice-Chancellor, which was most elaborate, is given in a note to this report.<sup>1</sup>

<sup>1</sup> Dec. 5, 1853.—Sir W. P. WOOD, V. C., after shortly stating the nature of the bill, and the appeal to the House of Lords from the decree of the Irish Court of Chancery, now pending, proceeded as follows: The demurrer to this bill has been rested entirely, on the part of the defendant, the heiress at law, on this ground, that a bill will not lie in this court for the purpose of establishing the will of a testator at the instance of a party who takes the legal estate under the devise. There are other questions independently of that which has been suggested in argument on the part of the plaintiff in supporting her bill. Those other questions I will refer to presently, but I confess that I should have found considerable difficulty in supporting the bill on the other grounds that have been alleged. Therefore, it has become necessary for me to consider this general question — whether or not a bill can be maintained by a party taking the legal estate by devise, for the purpose of establishing the will against the heir at law? In making this inquiry, I have found it necessary to go back to a great number of the earlier authorities; and there is considerable difficulty in obtaining any very clear light as to the origin of the jurisdiction in establishing a will against the heir at law. As far as one can trace it back, it seems to have arisen in some measure originally from the necessity of trying all questions on devises, except devises of real estates, in this court; because, previous to the Statute of Devises, the devise could only take effect, unless the lands were devisable by custom, by means of a feoffment to the uses of the party's will; and the question then would necessarily, in all cases, bring all the parties entitled by devise, and the heir at law, into conflict before this jurisdiction. What took place after the Statute of Devises had passed, and in the interval between the Statute of Devises and the Statute of Frauds, requiring the attestation by three witnesses, seems to be by no means clear; but there appear to have been instances, for which I am indebted to Mr. Monro, which have been collected and printed by him, (although the work is not yet published,) in a work of great research. With reference to the earlier decrees of the court, there seem to have been instances in which the court formerly took upon itself to determine the validity of wills, and that by a course which unquestionably now — especially since the case of *Lucas v. Burgis*, in the House of Lords — is not the course of the court. They took upon themselves to determine it by inquiry before this court; and I find two or three instances of decrees of this description in this book by Mr. Monro.

I find an instance of a reference to the master, or one or more masters, of the court, to inquire into the validity or invalidity of wills. There is one instance in the Registrar's Book, 1573, fol. 7. It says: "Where the matter in variance between the said parties was committed to the hearing, order, and final determination of Thomas Wotton, Esq., forasmuch as the said Mr. Wotton hath this day certified to this court, that in his opinion the whole cause in question resteth only upon the validity or invalidity of a will supposed to have been made by John Lucas, deceased, it is then ordered that the consideration of the said will be referred to Mr. Vaughan and Mr. Dr. Yale, two of the masters of this court, and they thereof to make report of the validity or invalidity of the same." Then there appear to be several cases of a similar description. That is the particular case of the validity of one will referred to the master to deter-

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 Boyse v. Rossborough.
 

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*Swanston, E. Younge, and J. V. Prior, in support of the appeal.*

*The Solicitor-General, (Bethell,) Roll, and Cairns, contra.*

On the case being first opened, some discussion took place as to

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mine. There is another case in the same Registrar's Book, 1573, fol. 208, where a question arose between parties claiming under two different wills, and it is thus entered: "Upon the hearing of the matter at variance between the said parties, there were exhibited in this court two several wills, pretended by either side to be the true will of Henry Hache, late of Faversham, deceased; and for that this court cannot well proceed further in the said cause without understanding which is the true will, it is ordered that the consideration of the said two wills be referred to Mr. Dr. Harvey, Mr. Dr. Clerke, and Mr. Dr. Hamonde, masters of this court, (so that neither of them have been counsel in the cause with either side,) they three, by all good ways and means they can, to gather out by proofs which of these two wills is the very true will indeed of the said Hache, and they thereof to inform this court in writing." That course of proceeding seems to have been taken frequently previously to the Statute of Frauds. After that, in some manner or other, which I have taken some pains to ascertain, but have yet been unable to trace, the court seems to have adopted the course of referring the question to the courts of law. I should state, that a little before the Statute of Frauds, the court seems to have departed from this mode of trying the will in its own forum, and adopted, by preference, the mode of referring the question to a court of law, and still retaining the cause. That seems to have taken place before the Statute of Frauds. There is a case which I find referred to in Mr. Spence's book — there is a slight mistake in the reference to the Registrar's Book — a case in the time of James I.: it is found in the Registrar's Book, B. 1604, fol. 944. Mr. Spence refers to fol. 941: "Whereas motion was this present day made by Thomas Creeve, being of the defendants' counsel, that albeit the defendants do not seek to alter the long possession specified in the order made on the 1st May, but are content the same shall still continue until the court shall give other order, yet since it appeareth by the said order that the question upon the hearing will be, whether a will or no will, which is merely triable by the law" — this was in the time of James I. — "it was most humbly desired that a special issue might be joined and tried upon that point, for the better informing of the court upon the hearing, which this court thinks reasonable. It is therefore ordered, that if the said petitioner shall not on Tuesday show unto this court good cause to the contrary, then the said parties shall join, and by such an issue as aforesaid: provided always, that no judgment shall be had upon the same trial, neither shall the plaintiff be interrupted in his said possession until the said hearing or other order shall be taken by this court touching the same." So that as early as the time of James I., it appears to have been thought by the court that the proper mode of trying the validity or the invalidity of the will was by a trial at law; but nevertheless, the case being sent to law to be tried, the court afterwards dealt with it as justice seemed to require.

Now, with regard to the proceeding to establish wills against an heir at law, there certainly is very considerable obscurity as to the mode in which that jurisdiction arose. The establishing of a will is clearly a very different thing from either, on the one hand, trying the validity or invalidity of the will incidentally, in consequence of there being outstanding legal estates, in which case the proper course would no doubt be to get rid of the obstacle of an outstanding legal estate, in order to have the merits tried, but to try the question by an action, not by means of an issue; or, on the other hand, from the course of perpetuating testimony in respect to a will, the effect of which is materially different in every way, as regards the heir at law, from establishing the will against him, he being under a decree establishing a will so bound with respect to its validity, that all the authorities state a perpetual injunction would issue against him in case of his making any attempt after such decree to impeach the will.

Then the question arises, how the court acquired this species of jurisdiction to establish a will, as to which I should have been very glad if I could have found any distinct authority; but it seems silently, in some mode or other, to have been introduced, and unquestionably it is found most frequently (but by no means, as I shall presently show,

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whether this bill could not be sustained on the ground that it was a cross bill; but the point was given up.

*Swanston.* There is no authority for entertaining such a bill as

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solely) adopted in cases where the trusts of a will had to be carried into effect under the direction of the court. Now, the practice of having the will established when any trust had to be carried into effect under the direction of the court, seems to have arisen extremely early; and one of the first instances in which the court appears to have thought it was absolutely necessary to do it as a general rule, (though the particular case itself was an exception,) seems to have been that case of *Harris v. Ingledew*, 3 P. Wms. 91, where the objection was raised in consequence of the heir not having been made a party to a suit to carry into effect the trusts of the will. Now, in the case of *Harris v. Ingledew*, this point was raised. There was a will devising lands to different persons on trust for the payment of debts, and the bill was brought by a simple contract creditor to have the trusts of the will performed for the payment of the debts. Then "the widow of John Ingledew, the brother, and her son, being the nephew and heir of the first testator, joined in a sale of several of these lands to several persons for valuable considerations; and the simple contract creditors now bringing their bill against the several devisees of the premises, and also against the purchasers, in order that the several lands might be sold for the satisfaction of their demands, the will was proved, but John Ingledew, the nephew, and heir of the first testator, was not made a defendant to the bill; upon which it was insisted that the heir at law ought to be a party, it being ever done in like cases; that, the bill being for a sale, if the heir was before the court, the evidence to the will would be perpetuated." Now, I observe here, that all through a great many of the early cases I find considerable confusion between the simple case of perpetuating testimony and the case of establishing a will. In this case, if the heir at law had been before the court, the bill would have been to establish the will, not a simple bill to perpetuate testimony. But it was argued, "that, the bill being for a sale, if the heir was before the court, the evidence to the will would be perpetuated; but in case he should not be a party, a decree for the sale of the estate would be vain, for no one would buy — at least, he would not give half the value for it; whereas, should the heir be a defendant, this will charging the lands with payment of the debts, the heir would be decreed to join; that the general practice in cases where a will of land is proved is to declare the will well proved — that is, well proved against the heir."

It will be found, in a variety of cases, that the common expression with reference to bills for perpetuating testimony was, that the will was called a will proved in equity. This question of the establishment of wills against the heir, seems to have been mixed up with bills for perpetuating testimony, although the two courses seem to have been essentially different, and the relief in every respect different; it being relief, in fact, in one case against the heir; and in the other case, there being no relief against the heir at all, except that he is simply brought here in order that so far hereafter he may be bound, that the evidence of the witnesses may be read against him in any case in which the will is disputed. That is the mode in which it is put. The custom is, "to declare the will well proved — that is, well proved against the heir, for it cannot be said to be proved against any one else. And suppose these lands should be sold by the devisees, pursuant to the decree, and afterwards the heir should sue for the estate, and recover, here would be a purchaser under a decree evicted, notwithstanding, for want of the plaintiff having made the heir a party; and yet the court ought not to suffer any thing to happen to the prejudice of those who are to be purchasers under its decrees." That is the mode in which the objection is put, and I think it throws some degree of light on what the course of proceeding was. Now, one finds, in several authorities that can be cited, but the one more usually cited is that of *Fearne's Posthumous Works*, (p. 234,) that it was the practice frequently, for parties who wished to make title to the estate, to proceed to prove the will in Chancery for perpetuating testimony; and that was called "proving the will in Chancery." And *Blackstone*, (vol. 3,) referring to that, amongst other things, in his short disquisition on the Court of Chancery, says this species of bill is the bill commonly adopted by the parties in possession

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the present; the bill which, under the circumstances alleged here, has always heretofore been entertained, is a bill to perpetuate testimony; and if such a bill as the present had been possible, we should never have heard of such a bill as that to perpetuate testimony in like

when the evidence is perpetuated, and it is called "proving the will in Chancery." But here, nevertheless, the parties seem to have entertained the notion that it was competent for them to file a bill to perpetuate testimony, and to do that alone; but it was also competent, when the will was so proved against the heir, to have a bill so framed that it should be declared well proved, and well proved against the heir; and they insisted that the court ought to do this, and ought not to suffer any thing to happen to the prejudice of those who were purchasers under the decree. The Master of the Rolls says: "This seems a material objection; for since the sale of the estate must affect all the devisees in proportion, and as the estate would not, without the heir being a party to the decree, sell for near the value, this might be a wrong to all the devisees, and occasion more of their lands to be sold than would, perhaps, be otherwise necessary. With regard to what has been urged, that where lands are conveyed by deed to trustees to sell, the heir, unless entitled to the surplus, need not be a party to a bill that prays a sale, it must be observed, that the proof of a will is attended with more solemnity than that of a deed, the former being supposed to be made when the testator is in *extremis*; and therefore, in equity, it is necessary to prove the sanity, which is all presumed in the case of the latter; also, a deed may be proved *viva voce* at the hearing, but no such order can be made for proving a will. The reason is, because here more is to be proved than barely the execution; for instance, you must prove that there were three witnesses, and that these subscribed their names in the presence of the testator." Then he says: "But after all, considering that William Ingledew, the first testator, had been dead ever since December, 1719, and that the freehold lands had been quietly enjoyed under the will, his Honor did decree a sale without the heir being a party, but said he would stop passing the decree in case the defendant's counsel should be able to show where, in the like instance, the court ever refused to make a decree without making the heir a party."

Now, since that time, no doubt it has been established that the heir shall in all cases be a party; but it seems to me to have been put in this case on the ground, which appears to me to be the true ground, that the court, in making a decree, will do the best it can for the purchasers. The court never does guarantee a title to purchasers, but in making a decree for a sale the court says: "If you bring the heir here, it will establish the will against him." Now, the question had arisen in *Cotton v. Wilson*, 8 P. Wms. 190, whether an ordinary purchaser under a decree—in the previous case the objection was raised by some other parties—but in *Cotton v. Wilson*, an objection was raised by a purchaser who had made a purchase out of court, under trusts for sale in a will, and then resisted the purchase, because the will had not been, as he called it, proved in chancery. The testator there had devised his estates on trust to sell. The estate had been sold to the defendant Wilson by the trustees, and the creditors of the testator brought their bill against the defendant Wilson to compel him to complete his purchase and to pay his purchase-money, to the end that they might be satisfied their debts. The defendant Wilson then said he believed Henry Taylor did duly execute the will, and devised the premises to be sold, and he had offered to complete his purchase, all proper parties joining; but he said: "The will was proved in this court to be duly executed, but the heir, who was beyond sea, in the East India Company's service, though made a party defendant, yet had not appeared to or answered the bill; and the defendant Wilson, though he was at first willing to purchase the premises, and had entered on good part thereof, yet other part of this estate, on which he had not entered, being much out of repair, the tenant racked, and the rents likely to fall, he was now desirous of being discharged from his purchase;" and he insisted, "that this being the case of a will, not proved in equity against the heir, it was a defective title; that none of the witnesses that had been examined for the will could be read against the heir, who in this case was probably adversary, and offended by the will; or else it might be reasonably presumed that he would, though beyond sea, have been prevailed upon to put in his answer to the bill; but that the

circumstances; and Lord Redesdale, in treating of original bills not praying relief, speaks of this latter description of bill only, and bills of discovery. Mitf. Plead. 41, 120, 121, 3d ed.; Fearn's Posth. Works, 234. The cases of *Lord Dursley v. Berkeley*, 6 Ves. 251;

heir might watch for an opportunity till the witnesses to the will should be dead, when he would contest the will, and take steps to set it aside." Then the Lord Chancellor Kings says: "It is very proper that a will disposing of lands should be proved in equity, especially in the case of a modern will; but I cannot say this is absolutely necessary to make out the title, any more than it would be to prove a deed in equity, by which the estate is settled from the heir at law after the ancestor's death. The will prevents and breaks the descent to the heir as much as a deed, and the hands of the witnesses to the will may be as well proved as those to a deed." Then he says: "Now, it would be no objection to a title if a modern deed, on which the title depended, was not proved in equity: why should it be so in the case of a will, where the same appears to be duly attested by three witnesses, whose names are mentioned to have been subscribed in the presence of the testator?" And then, on some particular grounds in the case, leaving the general point not entirely decided, whether a purchaser might make such an objection, he decided that there the purchaser could not make the objection. Now, it was very remarkable, that if the heir had been a party to that suit, although all this speaks of proving the will, it is quite clear that the will would have been established against him, for it would have been a bill for carrying into effect the trusts of a will. It is quite clear, therefore, that no light, as it appears to me, in either of these cases, is thrown upon the principle on which the court assumes the power of establishing the will against the heir, as distinguished from the mere case of perpetuating the testimony.

Now, it is extremely difficult, as a matter of principle, to see how any special equity arises against the heir from the circumstance of the will being a devise in trust, instead of being a mere simple devise. Now first of all, in no other case of a trust does any such question arise, as the Lord Chancellor observed. No deed is here required to be proved on account of the heir taking in default of a deed. Take the common case of an heir taking in default of appointment, with ultimate limitation to the right heirs. Nobody supposes that the heir can be brought here to litigate the question whether or not the appointment be a valid appointment; upon what ground, therefore, is it that, instead of simply perpetuating testimony, you establish the will against the heir, whenever there is a devise of this description? The devisee, although he be a devisee in trust, is quite capable of bringing an ejectment if he be out of possession. He is capable of filing a bill to perpetuate testimony if he be in possession. The circumstance of there being a trust or no trust makes no difference in his position with reference to the heir. Then can one safely say that the court assumes jurisdiction against the heir, in a case in which it has not the jurisdiction on ordinary principles, merely from the fact of the devise, but that it assumes jurisdiction because, that devise being a trust, this court is called upon to execute it? Now, I apprehend, the mere fact of this court being called upon to execute a trust, could not give any jurisdiction against the heir, as to whom the whole question of trust is a matter of perfect indifference. All that he has to try is, devise or no devise. The question of what is to be done under that devise by the devisee, with the estate which he so takes, cannot be a question which in any way, as it appears to me, can possibly raise (looking at it on principle alone) an equity against the heir. But I can very well understand this, that if any devisee have an equity against the heir, not only to have the witnesses examined, but to have a declaration of the court, if he think fit, that the will be established against the heir—I can very well understand why a court of equity will say, if you come into this court to carry into effect the trusts of the will, and you require this court to aid you for that purpose, by sale or otherwise, we will insist upon your doing that which as devisee you are entitled to do in order to establish the will against him, and conclude the matter at once as between all parties to the litigation. The case does not always arise on a sale. It may arise in any other trust that may be carried into effect, and the court may in like manner say, when the devisee has a right to file a bill to establish a will against the heir, we will take care, whenever you come to carry into

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*Allen v. Allen*, 15 Ves. 130; *Foulds v. Midgley*, 1 V. & B. 138; and *Bidulph v. Bidulph*, 2 P. Wms. 285, establish clearly what is the ground for a bill to perpetuate testimony, and they exclude every pretence for such a bill as the present.

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effect the trust, you shall make your trust effective and complete, by taking to yourself all those rights which a devisee is entitled to exercise, and insisting, therefore, on your bringing the heir here, in order that you may have a complete and final decree, quieting the whole question between the heir and devisee under the will. But it seems to me impossible to assume, as the ground of jurisdiction, that the court experiences a difficulty in executing the trust without establishing the will, because, if that be so, in every case where the court feels a difficulty — and it frequently does in other cases, as in the one I have put, of an appointment, and the heir taking in default of appointment — it ought to have the same equity. If the ground of equity be as might be suggested, (and it seems to me to be thrown out faintly, in some of the authorities, that the trustee has a right to the protection of the court in executing his trusts,) then I cannot at all account for another class, a totally separate class, in which the will may be established against the heir, where there is an outstanding legal estate, and no trust to be executed by the court, (another case I shall come to presently,) but simply an obstacle to be removed in the way of the devisee in respect of establishing his title. The proper course in a case of that description, unless there be an original inherent equity in the devisee to have his right tried against the heir, would be to remove the obstacle, the outstanding legal estate, and to leave the devisee to bring his ejectment. That would be the proper course in which that was the only difficulty, and not to establish the will as against the heir.

I have been now considering it simply on principle; and I confess, as far as principle is concerned, that I cannot see any possible ground of equity arising for this particular variety of relief, as against the heir, simply on the ground of the parties wishing the trusts to be executed. I may observe further, that the two things are entirely separate. The heir has nothing whatever to do with any of the trusts. After an issue is found against the heir, I apprehend that the parties may either stay all proceedings against the *cestuis que trust*, if they were not further minded to carry into effect the will, or dismiss the *cestuis que trust* from the proceeding, still retaining the decree establishing the will against the heir. I do not see what is to prevent them so doing. Again, take this case: suppose the case of a devisee in fee, in trust to raise a given sum of money, and to apply it for a certain purpose, say, to raise the money immediately, and to invest it in the funds, and a direction that the money so invested in the funds should remain until A, B attained twenty-one, and then that he should be entitled to the same, but it should not be a vested interest until he attained that age, and subject to that, to the devisee in fee for his own benefit; and suppose a bill filed by the devisee against the heir to establish the will, and against the party entitled to the charge, as to which his title is in a sense contingent; and suppose, the heir disputing the will, an issue is directed, and it comes back to the court, and at the hearing it turns out that the party has died under twenty-one — I apprehend that in such a case as that it would be very strong to say that such a bill must be dismissed — that you cannot proceed further because the trust that remained to be executed is gone, and the party is left with the legal estate. One does not see any ground or reason for it. The heir has nothing to do with the trust — he is no party to that inquiry. The moment the will is established against him he ceases to have any interest in the case; and you, on the one hand, find frequent instances, even before the late rules of the court, carrying into effect, without the heir, trusts against the heir where he is abroad, or where they thought the will not sufficiently proved; yet they would direct the trusts to be carried into effect where the heir was before the court; and, on the other hand, you will find, as I shall presently state, cases where the will was established against the heir, and no trust directed to be carried into execution.

I have been trying this on principle hitherto. I quite agree with Mr. Russell, that one must not allow one's self to reason on principle against the decided stream of authorities. Mr. Russell stated, you would find no instance of any decree in this court establishing a will which did not proceed also to direct a trust to be carried into exe-

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[KNIGHT BRUCE, L. J. My impression is, that when I was an equity draftsman, I would have drawn such a bill as a mere matter of course.]

The theory of the Vice-Chancellor's judgment is most extra-

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cution. Now, the most remarkable circumstance with regard to this proposition is, that one of the most recent cases has been a case exactly of that description — a case which seems to have been considerably discussed at the hearing, not certainly on this ground, because this ground was not raised; but certainly, considering who the learned judges were before whom that case went, I cannot conceive that it could have escaped their attention. I am not now on the question, which I must presently refer to — and there are various dicta which seem to me to throw considerable light upon the question — but I am now upon the question, whether or not there has been such a constant course of practice by this court that it must be considered to have been established on principle that you can never have a decree of the court for establishing the will without at the same time directing the trusts to be carried into execution. Now, in the case of *Grove v. Young*, (5 De G. & S. 38; s. c. 9 Eng. Rep. 47,) which arose out of *Grove v. Bastard*, 2 Ph. 619, before Lord Cottenham, his lordship having expressed his opinion (to which I shall have occasion to refer presently) that the purchaser could not be compelled to take the title without the will being established as against the heir, the bill was filed in *Grove v. Young*, to establish the will against the heir. In that case there was a devise to trustees to sell, and the bill originally prayed in this manner. Mr. Raech has been good enough to send me the original papers. The bill prayed, “that the will of the said C. M. Young may be established by the decree of this honourable court, and that (if necessary or proper) the trusts of the said will of the said C. M. Young, so far as such trusts still remain unperformed, may be carried into execution by and under the direction and decree of this honourable court; and if the said defendant shall not admit the said will of the said C. M. Young to be a valid will, then that an issue may if necessary be directed, or an action, or such other proceeding as this honourable court may think fit, may be ordered to be brought or taken for the purpose of trying the validity of the said will of the said C. M. Young, and that all proper and necessary directions may be given for effectuating the several purposes aforesaid.” That, of course, was a proper bill in a common form. But, however, before the hearing the bill was amended. The trustees alone were made parties. There still remained on the bill a statement that they were devisees in trust to sell, and there still remained a statement that they were embarrassed in the execution of the trusts, in consequence of the party not choosing to complete the purchase unless the will were established. But then it only prayed that the will of Young might be established by the decree of this honourable court, striking out every word about carrying the trusts into execution, and then, by amendment, it was put, “and if the said defendant shall not admit the said will of the said C. M. Young to be a valid will, then that an issue may if necessary be directed, or an action, or such other proceedings as this honourable court may think fit, may be ordered to be brought or taken for the purpose of trying the validity of the said will of the said C. M. Young.” Now, that case, in that general form, praying only to have the will established, originally came before the then Vice-Chancellor, Sir J. L. Knight Bruce. The heir, who does not appear to have been a very willing party to the litigation, (the trustees were in possession,) had brought an action, in which he had failed. The case is reported, before Sir J. Parker, V. C., in 5 De G. & S. 38; s. c. 9 Eng. Rep. 47. The report states, “This case came on for hearing before Sir J. L. Knight Bruce, V. C., in December, 1850, when the court directed an issue at law to try the questions raised by the defendant.” That was the original attempt. Here was a bill, not asking to have any trusts executed; this decree, therefore, cannot rest on any supposed equity of the court requiring, for its own guidance, an action to be brought; it cannot rest on the supposed equity of the trustee to have the assistance of the court in carrying into effect the trusts of the will, which, for the reasons I have already stated, I do not think can be maintained. But upon the 17th December, 1850, the heir “asked that the question might be tried at law in an action of ejectment, when the court directed an action of ejectment to be brought by the devisees against the heir at law;” and I have, accordingly, the note on Mr.

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ordinary: it is this — that as there is no intelligible ground for holding that a devisee in trust should be entitled to file such a bill, if a legal devisee could not, therefore the cases where this court established the will against the heir at law, when the will contained trusts,

- Rasch's brief, which is entirely to that effect. The note is: "V. C. Knight Bruce. December 17, 1850. Decree to contain statement that heir, electing between issue and action, elects action of ejectment. Action of ejectment to be brought; declaration to be delivered on or before the 1st January next in the action. Plaintiff to admit testator's seisin, and heirship of defendant, and to call or tender George Wilson Grove and Henrietta Martha Young as his, plaintiff's, witnesses." Therefore, this was a case in which no trusts were required to be carried into execution; nevertheless, the issue was directed. Then it came on again, before Sir J. Parker, V. C. The question there was a question of costs; and the Vice-Chancellor says: "I am not prepared to go the length as to the costs asked by the plaintiff. There is no doubt as to the general rule as to the costs of establishing a will against the heir at law. When a devisee comes to this court for his own benefit, to have a will established against an heir at law, by a decree binding him, the heir at law is entitled to put the devisee to the proof of his title; and, in an ordinary proceeding, the heir at law has his costs." He refers in no way whatever to the circumstance of its being a trust, or any trust existing. The court certainly does not direct the execution of any trusts; and there stands the decree in that shape, the case having passed through complete investigation before both those learned judges. Therefore, it is quite plain that Mr. Russell's proposition cannot be maintained — that there is no instance of a decree for establishing a will without directing the trusts to be carried into execution.

Then, there remains this to be considered, whether or not an equity of this sort exists, namely, an equity on the part of the trustee to be protected (a peculiar sort of jurisdiction arising from that) in the execution of his trust, and, therefore, a right to bring the heir at law here for the establishment of the will. With reference to the circumstance of the court directing issues at the instance of devisees where the sole difficulty is an outstanding legal estate, there is the case of *Berney v. Eyre*, 3 Atk. 387, which has been referred to in the course of the argument of this case, and in which it does not appear strictly on the face of the bill, though I think, looking at the decree, I must assume that the court somehow imagined there might be those outstanding legal difficulties. The record has been searched, and it does not appear that there was any allegation of an outstanding legal estate; but the bill prayed that an issue might be directed, and that outstanding terms might not be set up. An issue was directed in that case; and, certainly, that cannot have been at all with a view to the rights of a trustee for his protection, but simply on the ground of these outstanding difficulties. It directed an issue, and that no outstanding terms should be set up — a singular direction in an issue, and which throws some degree of obscurity, perhaps, on that case as an authority. But, there is another case, before Lord Manners, who, I apprehend, was extremely well informed, on subjects of this description, as to the jurisdiction of the court, and the general course of the practice of the court — a case of *Blake v. Forster*, 2 Ball & B. 387, which is a very complicated case in its facts; but the result may be thus stated: A remainder-man, under the will of a testator who had mortgaged his estates, (the legal estate was outstanding,) after a vast amount of litigation with reference to these mortgaged estates, and a foreclosure of the mortgage against improper parties, as he alleged, improperly obtained, and, after a long interval of time, coming into possession as a remainder-man, filed his bill, first of all to have redemption against the mortgagees, and then, to have a declaration in his favor as against the heir at law of the testator. Well, now, the plaintiff contended that, under the circumstances of the case, the will ought to be taken at once as established. It is unnecessary to go through the long detail of the case, but the contest about the will arose from this — whether or not the testator was a relapsed papist. That was the question that arose. There had been a great many proceedings, and the bill having been filed after a long contest, the case coming on to be heard in 1813, upon a bill only recently filed, and the matter having been in litigation from about the year 1750, of course, great objections were made as to the time. The Lord-Chancellor first disposes of the objection as

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must be taken to be instances of the application of the universal jurisdiction of the court. But I submit that the case of a devisee in trust is essentially distinct from the other. In the case of a legal devise, it is a mere contest between the devisee and the heir; but, in

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to the time, on the part of the mortgagees, who had got into possession, and had foreclosed against parties, which the Lord-Chancellor held could not bind the right of the plaintiff; and then he comes to the right of the heir, and says this: "Can I now put this will in a course of inquiry, in order to establish its validity? Each side has contended, that after such a lapse of time no issue on the will ought to be directed; but they draw opposite conclusions. The plaintiff insists that the will ought to be established, the defendant that it ought to be set aside. I cannot agree with either. I think the circumstances counterbalance each other, so as to leave the question very much in doubt. I think the heir at law has a right to say that, according to the course of the court, the will cannot be established against him by a decree, without an issue or an ejectment, if he require it; and I think the plaintiff, independently of the question of redemption," (which was remarkable,) "has a right, under the limitations of this will, to have its validity ascertained." Now, the will itself was peculiar: it had a conveyance to trustees, in trust to pay debts, which, on recent authorities, which had then been decided, was only a chattel interest till the debts were paid; and, then, all the limitations were to uses; and the plaintiff would claim under a use. And the Lord-Chancellor says: "Independently of the question of redemption in a bill so framed, the debts having been long paid, I think he has a right to an issue against the heir at law;" and, accordingly, the Lord-Chancellor ends by directing an issue against the heir at law.

Therefore, on the one hand, you have the case of *Grove v. Young*, deciding that this court does not, for its own purpose, require the will to be established when there is nothing that this court has to carry into effect, (and in *Grove v. Young*, it did not direct the trust to be carried into execution;) and, on the other hand, you have Lord Mannors, in the case I have just referred to, saying it is a question which the party, independently of the right to redemption, would have a right to have tried as against the heir at law. Now, therefore, I think that if one cannot, on principle, find any ground on which the mere fact of the trust should create an equity against the heir at law, one does not find one's self bound by a series of authorities (as Mr. Russell contended I should) to hold, that in every case where the court attempts to establish a will, it is also carrying the trusts into execution. If I find, further, that relief was given in a simple case, where there was an outstanding legal estate, and where, unless there was some special equity to establish the will clearly, the proper course would be to remove the outstanding term, and direct an action to be brought by the devisee—I say, I think, when I find authorities of that kind, independently of the various dicta, which I am about to refer to, of several judges on this subject, we must come to the conclusion that there must be an inherent equity on the part of the devisee, although a simple devisee, to have the will established, if he think fit, against the heir at law.

I must now notice another objection of Mr. Russell, which is this; he says there is a twofold current of authority against this proposition: first, the current of authority, I have disposed of; and, secondly, he says there was a course of practice current, namely, that bills were common to perpetuate testimony, and, therefore, that this is an indication that that, and not to establish the will, was the right course. No doubt there were many bills to perpetuate testimony. I can easily conceive why a party is not bound to establish the will against the heir at law; and a party having an option, might well prefer a bill to perpetuate testimony, because what he does is this—he is confident in his own witnesses, and he examines them. They cannot be cross-examined on a bill to perpetuate testimony.\* They all speak perfectly well knowing that no proceeding can be taken against them for perjury, for the evidence cannot be published, and the party has every possible advantage in perpetuating testimony in that mode against the heir, if he be so minded, instead of bringing it to open conflict. The question I have to try is, whether he is at liberty to litigate it; and I apprehend he is at liberty, al-

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\* See the remarks on this in the argument above.

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the case of a devise in trust, the devisee is placed in a new position. There is a duty imposed upon him to perform the intention of the testator; and the heir cannot deny that if the will is valid, there are trusts created by the act of the testator, through whom he also claims,

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though by no means bound to do so; and I think, in those bills for perpetuating testimony at the instance of purchasers, where the vendor would necessarily do the least he could to disturb the title, and the utmost point contended for by the purchaser being, in those cases, that he has a right to have it "proved (as it is called) in chancery." I can understand why the bill should be limited to that, and why the parties should not be minded to carry it into further and more open litigation.

But I think a great deal of light is thrown upon the subject by those observations of Lord Hardwicke, in *Berney v. Eyre*, 3 Atk. 387. He seems there to think, that there must be a twofold mode—a mode of either perpetuating testimony or bringing the matter to an issue. His lordship lays down the following general rules: "If a devisee brings a bill merely in *perpetuum rei memoriam*, and the heir at law does nothing more than cross-examine the witnesses who are produced to confirm the will, he is entitled to his costs. If he examines witnesses to encounter the will, then he shall not have his costs. This is where the bill does not pray relief, or is not brought to a hearing. But, when the cause is brought to a hearing, if the heir at law has an issue directed to try the will, and the will is established, as he has a right to be satisfied how he is disinherited, he shall have his costs." There clearly, Lord Hardwicke seems to point to two distinct courses—the one, a bill to perpetuate testimony; the other, having your bill brought to a hearing, if you thought fit; and in that case, the heir, if he had an issue, which he had a right to have, should have his costs, and that, you observe, in a case where the bill was not a bill of a party seeking to carry into effect any trusts under the will, but the bill of a party simply embarrassed by the existence of the outstanding legal estate, which, I apprehend, would not give him the equity to have an issue, whatever right it might give him to have an action, unless there was, independently of his position, and by virtue of his being a devisee, a right to have the issue tried as against the heir; and Lord Hardwicke takes no notice whatever of there being a difference between a devise in trust and a bill to establish a will, but simply takes the case of a devisee bringing a bill in *perpetuum rei memoriam*, which is one course, or bringing it to a hearing, which, he says, is another course.

Now, that brings me, lastly, to the observations which arise from the dicta on this subject, which never seem to draw the distinction in any way between the two cases of a devise in trust and the case of a mere devise. First of all, you have the case which was referred to by counsel in the argument, before Lord Eldon, of *Bootle v. Blundell*, 19 Ves. 494. He says, speaking of there being a necessity of examining all the three witnesses: "Suppose, then, an ejectment directed, with admissions about possession, &c., or any other form of action, that is one course; but I have never known any other taken upon an establishing bill than by directing an issue." And he there draws at once widely the distinction which exists between the case of merely setting aside legal impediments, in which case an action would be the course, and the case of an "establishing bill," (as he calls it,) which is that of directing an issue; and he speaks of it by a name, as if that species of bill, "an establishing bill," were well understood. The rest of his remarks by no means diminish the force of this expression, and he says: "I think the course which is taken in such cases, is to direct an issue." Further than that, which makes a contrast, in my opinion, on this point, you find, in *Pemberton v. Pemberton*, 18 Ves. 290, where Lord Eldon is considering the case of an heir who brought a bill to set aside a will, and alleged outstanding legal estates, an issue having been directed to be tried, in considering the question on a motion for a new trial, his lordship says he is not certain that the proper course had been taken—there ought to have been an issue. He says: "This court cannot try the validity of a will;" and I apprehend, wherever the mere difficulty is, that there is an outstanding legal interest which prevents the trial at law, the course is to direct an action, not an issue; but he says, in an establishing bill, the proper course is to direct an issue; and that was the course followed in *Blake v. Forster*, 2 Ball & B. 387, before Lord Manners, where, according to the practice of the court, unless the parties had a right to an issue

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which the devisee is bound to perform ; and the court has jurisdiction, therefore, over the estate for the purpose of administering the trusts. It is, therefore, only as an incident to the performance of the trusts that this court establishes the will against an heir at law ; and on this

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to establish the will against the heir, the proper course would have been an action. Then, in 19 Ves. 670, there is another case, which, perhaps, assists in throwing some light on the subject—the case of *Morrison v. Arnold*, before Lord Eldon. There, “a motion was made that depositions, taken in a suit instituted to perpetuate testimony, may be published, the witnesses being still living.” That was to perpetuate testimony, there being a will of later date set up, which, it was alleged, had not been duly executed. The plaintiffs were trustees for sale, and they had sold, or rather were about to sell, for certain purposes, and they wanted to have the evidence published. Lord Eldon says, after deciding he cannot do that: “And, further, looking at the first will, and what the trustees under it are about, I doubt whether a bill to perpetuate testimony is, in this particular case, exactly the bill that should have been filed.” It is quite clear his view there was, that it ought to have been a bill to establish the will. It is true, there was a trust for sale there, and it may be suggested that it does not very prominently bear on the point now particularly at issue.

Then, there is another case which, I think, again shows that this distinction, now attempted to be made, is never brought out in the course of the observations made by the court. I mean the case of *Tatham v. Wright*, 2 Russ. & M. 1. This is the report of it before Sir John Leach, M. R., in the first instance ; and, then, there is a further report of it before the Lord-Chancellor, assisted by Tindal, C. J., and other judges of the common-law court. What Sir John Leach says is this: it was the bill of the heir to have the legal estate put out of his way. Sir John Leach says: “It is further to be observed, that the bill filed in this case, is not by the devisees to establish the testamentary instruments, but it is a bill by the heir at law claiming against these instruments. Now, the court does not there make any observation. I do not recollect, at this moment, whether the devisees were of legal estates, or whether they were trusts, but the court certainly draws no distinction as to there being a difference between a bill by a devisee on a will where there are trusts, and the case of an ordinary devise. The court says, it is not a bill filed “by the devisees to establish the testamentary instrument, but it is a bill by the heir at law, claiming, against these instruments, to have a legal estate put out of his way, in order that he may try the validity of these instruments by ejectment ; and no decree in this cause would be conclusive upon the question of the validity of the will. The plaintiff might, by redeeming the mortgage, get in the outstanding legal estate by an assignment of the mortgage ; or even upon the hearing upon further directions, he might still contend that he ought not to be concluded by the trial of the issues, and that the court of equity should still permit him to proceed, by restraining the defendants from opposing to him the legal estates.” Then, when it came before the Lord-Chancellor, assisted by Tindal, C. J., and the Lord Chief Justice, we cannot doubt, from what one knows of his learning, and his anxiety in all cases to make himself master of the case, must have well informed himself of the proceedings before delivering his view, which was adopted and sanctioned by the Lord-Chancellor ; Tindal, C. J., says this: “It may be taken to be generally true, that in cases where the devisee files a bill to set up and establish the will, and an issue is directed by the court upon the question *devisavit vel non*, this court will not decree the establishment of the will unless the devisee has called all the subscribing witnesses to the will, or accounted for their absence ; and there is good reason for such a general rule ; for as a decree in support of the will is final and conclusive against the heir, against whom an injunction would be granted if he should proceed to disturb the possession after the decree, it is but reasonable that he should have the opportunity of cross-examining all the witnesses to the will before his right of trying the title of the devisee is taken from him. In that case, it is the devisee who asks for the interference of this court, and he ought not to obtain it until he has given every opportunity to the heir at law to dispute the validity of the will.” There is no reference there to its being a devise in trust or not in trust ; and, indeed, as I said before, I cannot understand what possible equity can arise against the heir from that circumstance. Then, he says

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ground, that the court may be certain that its orders shall be effectual. Lord Redesdale, in speaking of a bill to establish a will against the heir at law, evidently considers it as incidental only to the execution of trusts. At p. 139, (Mitf., 3d ed.,) he says: "To a bill to carry into

this is laid down by Lord Eldon on a bill to establish a will—"an establishing bill," as Lord Eldon calls it in one part of his judgment; and he says: "In *Lowe v. Jolliffe*, 1 W. Bl. 365, where the bill was filed by the devisees under the will, and an issue *devisavit del non* was tried at bar, it appears from the report of the case that the subscribing witnesses," and so on. I have looked at *Lowe v. Jolliffe*, and I find it is a bill for carrying into effect the trusts of the will; still, the distinction is in no way whatever noticed.

Then, we come to the case of *Grove v. Bastard*, 2 Ph. 619, before Lord Cottenham, that being a bill for specific performance, in which it certainly did appear that the vendors were trustees for sale. The bill being simply a bill against the purchaser, Lord Cottenham makes this observation: "It is always a painful duty for the court to have to decide on a title in the absence of the party interested in disputing it." He says: "The courts in this country have not the power which the courts in Scotland have of settling such questions by declaration; but, in this particular instance, this court has, in effect, the power of a Scotch declarator, for it has the power of bringing the question raised by the third party to the test." Then, he goes on to give his reason for the doubts upon that will; and he says the Master of the Rolls says, in *Green v. Puford*: "If it were possible to institute any inquiry as to the facts which took place, I think it ought to be done for the satisfaction of the purchaser, but I do not see how that can be. That is an authority, that if there are means of bringing the objection to a test, the court will do so before it compels the purchaser to take the title. In this case, I have the means, by requiring the vendor to file a bill to establish the will against the heir. In that way the question will be speedily and conclusively determined." No doubt he had the fact before him, that the vendor in that case was a devisee in trust, but he speaks of it as fixing the vendor with a trust, if he thought fit, under the peculiar circumstances of the case, and he makes no distinction whatever of its being the case of a devisee in trust; and the truth is, as I said before, that when it came to be decided in *Grove v. Young*, it was decided on a bill filed, not asking to have the trust carried into execution; and Sir J. Parker, V. C., in the same way, says this is the case of a bill by devisees to establish the trust.

Now, I have looked at Sir E. Sugden's book on Vendors and Purchasers, to see if he raises the distinction on the question of whether a purchaser has a right to insist on the will being so proved in chancery, and I find no such distinction drawn by him. I have here rather an old edition; it is the first volume of the 9th edition, p. 369, (10th ed., vol. 2, p. 103.) He says: "Formerly, where a vendor claimed under a modern will, by which the heir at law was disinherited, it was usual to require the will to be proved in equity against the heir at law, but this practice is now almost wholly discontinued. In the case of *Cotton v. Wilson*, the purchaser was in the first instance discharged from his purchase on account of the will not being proved against the heir at law; but, on a rehearing, he was compelled to take the title. This decree, however, was made on the particular circumstances of the case, and the point was by no means settled. But, in *Bellamy v. Liversidge*, the title received the master's approbation, although the will was not proved against the heir at law; and, upon exceptions to his report on that account coming on, Lord Kenyon, then Master of the Rolls, overruled them. It is not unusual to require the heir at law to join in the conveyance, if his concurrence can be easily obtained; and, where he is a party to a conveyance in any other character, he is invariably made a conveying party in his character of heir at law, although, in strictness, this could not be insisted upon. If it should ever be thought that a modern will must be proved against the heir at law, yet it seems clear that equity would not compel the vendor, at the suit of the purchaser, to prove the will *per testes*. The objection, therefore, under any construction, could only be set up by a purchaser as a defence to a specific performance, and even to that extent it would not now prevail." Then, I was curious to see what he said after the decision in *Grove v. Bastard*, and I looked at the Concise View of the Law of Vendors and Purchasers,

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execution the trusts of a will disposing of a real estate, the heir at law of the testator is deemed a necessary party, that the title may be quieted against his demand; for which purpose the bill usually prays that the will may be established against him by the decree of the

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and, at p. 327, he says—it follows the concise statement of the passage I have read: "However, in a case where the will was in favor of the solicitor who drew it, and his children, although the heir had failed in an ejectment against him, and a new trial had been refused, the court refused to enforce the acceptance of the title; and, as the purchaser was willing to wait, the vendor, the plaintiff, was required to file a bill to establish his title against the heir. An answer to such a bill, abandoning the claim, would remove the objection, and if an issue were required, it would be properly tried between the heir and the devisee. Of course, the seller would not have been compelled to take this step, but the court no doubt would, if he had declined to do so, have dismissed his bill." I do not find there the slightest observation made by Lord St. Leonards, upon the circumstance of its being a trust, or any difficulty arising from that; nor in any part of his observations is any distinction drawn, on the part of that learned author, in pointing out to purchasers, what would make a great difference in any case, that where it is not under a trust, you cannot have any bill by which the will can possibly be established.

Now, therefore, having looked at the case under all these different views—first of all having considered what equity arises against an heir for this peculiar decree—this very strict and peremptory decree, which forbids his ever disputing the question again, from the circumstance of there being a devise in trust, instead of there being an ordinary devise—I have totally failed to find any ground for any such distinction. If I had found a current of authority that bound me, I must have bowed to that current of authority, although I should not have been able to discover the principle on which that peculiar relief was so granted. But when I find that, on the one hand, I have Lord Manners, saying: "I will assist a person in this way—that is, by way of issue—and will establish the will against the heir, where his only difficulty is an outstanding legal estate, and his only proper remedy in equity would be ejectment after that difficulty had been removed;" and when I find, on the other hand, both Sir J. L. Knight Bruce, V. C., and Sir J. Parker, V. C., concurring in sanctioning a decree on a bill which did not ask to carry any trust into execution whatever, but simply to establish the will against the heir at law, although the party happened to be a trustee; looking at those authorities, it seems to me impossible, upon any basis upon which I can rest, to say that the equity is confined to the circumstance of there being a mere devise on trust; and I must say, at the same time, that although, on the one hand, I have been wholly unable to find a case in which the party who has actually instituted this proceeding, has been a mere devisee, yet there are, on the other hand, several cases of bills for perpetuating testimony; and there might be very good grounds why the party might prefer to have the matter brought to a litigation. I say, taking all those circumstances into consideration, it appears to me that the only equity must be an equity from the circumstance of a devise, and the jurisdiction assumed by this court in cases of devise, to have the heir, although he has brought no action—although he has done nothing which brings him within the ordinary jurisdiction of bills of peace, yet to have the title once and for all quieted in this special case of a devise.

I have not noticed one argument of Mr. Russell, which I think can scarcely have much bearing on the subject. He said there was no reciprocity—that the heir cannot bring his bill to set aside the will. I do not think that any argument can be deduced from that—that because the heir, having a good title at law, cannot file a bill to set aside the will, therefore this court must be assumed to have no jurisdiction to establish the will against him. It does not appear to me that the two things are at all of that analogous character, that you would necessarily expect to find the one where the other existed. At the same time, it may be said that that doctrine was only settled after a considerable struggle; for in a case before Lord Hardwicke, (*Webb v. Claverden*, Atk. 424,) he actually did direct an issue upon a bill filed by an heir who had no obstacle in his way, and when the cause came back, he said he should not give the heir his costs, because, he said, if the party will be so vexatious as to come here, when he

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court." But there is no allusion to a mere bill to establish the will against the heir at law. Can it then be assumed from this passage, that Lord Redeadales meant to say, that, under totally different circumstances, it was usual to pray that the will might be established?

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might have gone to law, I shall not give the heir his costs. In *Jones v. Jones*, 3 Mer. 161, which has now settled the point with reference to the right of the heir to endeavor to set aside the will for invalidity, it is very remarkable the counsel do not say it never has been done, but they say that the court has never done this without directing an action or an issue; and Sir W. Grant says: "I do not say that there have not been cases of issues directed where it is not opposed—it is unnecessary to inquire whether there have been or not; this court will not interfere to give him that relief." That was settled after some struggle. Then Mr. Russell also relied greatly upon the constant expressions, found over and over again, no doubt, by the court, that this court cannot decide on the validity or invalidity of a will. There is no question of that; but the meaning of the expression is, that the heir has a right to have the question tried at law. That, however, does not mean, that when the validity has been tried at law, the court cannot establish the will. That is the point I have to consider. Now, if so, of course every decree for establishing a will, either in the case of a trust or otherwise, must be wrong. The court always sends it to an issue to have the point determined at law, and then, when it comes back, it establishes the will. That is the only case before me that I have to try.

Now, there was another objection of Mr. Russell on the demurrer which was wholly independent of the main question, which was, that the bill did not sufficiently aver the claim of the heir at law; but I think that the claim of the heir at law is sufficiently averred in this respect, that the bill does not aver his title, but it avers his claim. I do not think it is competent for him, who appears on the face of the bill to have succeeded in his character of heir in Ireland, to disclaim his title here, or to say that there are any further averments necessary, than those facts stated in the bill, to support the rights of those persons proceeding against him as heir, he being the person fixing them in that character, and who has succeeded, to a certain extent, in Ireland, in that character. It is very curious that the heir has succeeded in Ireland upon the question of raising the validity or invalidity of the will, on a bill which follows the rules and regulations of this court; he has had the question tried upon an issue. It is probable he might have alleged outstanding terms, but it is not so stated in the bill; but he appears so to have tried it, and he appears to have succeeded. I do not think that is material one way or the other.

There were two other grounds suggested for supporting this bill, which, if I could have adopted them, would have saved me a good deal of difficulty and a good deal of labor; but I do not feel that I can rest on those grounds to support the bill. The principal ground was this—if there be an outstanding trust estate, and the court interferes upon that ground, as it has done in some of the cases which I have referred to, then that would apply to the present bill, because this lady, after the devise, conveyed this estate to trustees; and there is an allegation in the bill that these trustees cannot act, and will not act, on account of the claim set up by the heir. It would be impossible to sustain a bill upon such an equity—an estate conveyed by a party to his own trustee, raising, as he says, a difficulty in the way of his trying the question; and the proper course would be, if he was out of possession, for him to file a bill to enable him to bring proceedings in the name of his trustee; or if he was in possession, as in this case, and the trustee did not take a proper step, and supposing the other ground to fail, which I have disposed of, and it rested upon this alone, then his proper course would be to have a bill to perpetuate testimony on that ground. There is no obstacle to his trying the right. The party cannot say, "I have the estate in my own trustee, and I am afraid that will raise some impediment to my trying the right against the heir." The equity against the heir must be an outstanding legal estate, which he in equity is about to avail himself of. I do not think I could in any way rest upon that as a ground for supporting the bill.

Another point has occurred to me, which was this—if it had been a bill in this court in England, I should have been inclined to think the bill might have been sup-

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Lord Redesdale also took the same view — namely, that it was as an incident only to the performance of trusts that the will was established against the heir at law — in *Devonshire v. Newenham*, 2 Sch. & L. 199, 207, 208, and in *Lord Fingall v. Blake*, 1 My. & C. 113, 115, 116; and the persons who framed the 31st General Order of the 26th August, 1841, must also have taken the same view of the case. The following cases are also authorities for this view: *Harris v. Ingledew*, 3 P. Wms. 91; *Bootle v. Blundell*, 19 Ves. 494; *Morrison v. Arnold*, Id. 670; and *Cotton v. Wilson*, 3 P. Wms. 190; as is also Sir E. Sugden's Concise View of Vendors and Purchasers, p. 327. This latter authority is wholly inconsistent with the supposition that such a bill as the present will lie, for the court would not compel a purchaser to accept a doubtful title if the devisee could have placed him beyond all danger. If such a bill as the present will lie against the heir at law, there will be no reciprocity for an heir at law in possession. *Pemberton v. Pemberton*, 13 Ves. 290; *Jones v. Jones*, 3 Mer. 161; *Mackrell v. Hunt*, 2 Mad. 34, note. The only case in which a bill like the present has been sustained is *Grove v. Young*, 5 De G. & S. 38; s. c. 9 Eng. Rep. 47. The bill in that case was filed by the direction of Lord Cottenham in *Grove v. Bastard*, 2 Ph. 619; but I submit, that, as there were trusts declared by the will in that case, what the Lord Chancellor meant was, that the ordinary bill should be filed — that is, to execute the trusts and establish the will; and although the bill in *Grove v. Young* did not ask that the trusts might be performed, but was confined to asking that the will might be established, still, it cannot be cited as an authority for the other side, as the objection was not taken, and the heir was not unwilling to try the validity of the will.

[KNIGHT BRUCE, L. J. The present question was not alluded to in that case.]

There is another ground upon which this court would entertain the jurisdiction to establish the will, where there are trusts to be performed by the court, and that is from feelings favorable to the heir. A suit, instituted to execute the trusts of a will, is a proceeding essentially hostile to the heir — it is, in fact, disposing of his estate;

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ported. There appears to have been a bill by the heir impeaching the validity of the will *simpliciter*, and an issue directed and tried upon that. Of course, if all had happened in this court which is stated in this bill, the case would have been concluded, but the fact of the existence of another suit in this court would probably have given to the other parties a right to file a cross bill to establish the will. But there being a litigation in Ireland to recover the Irish estates, that would give no species of equity in respect of a cross bill, nor a special equity in the nature of a bill of peace, more especially as the heir has succeeded; and therefore he could not be supposed to be proceeding vexatiously to contest those rights which he has there established. It seems to me, therefore, to be really brought back to the simple question, which the court cannot avoid dealing with; and although the case is new in substance, it does seem to me that there is a mass of authority which I should have to get rid of, if I were to hold that a party taking under a mere devise of this sort were not allowed to file a bill in this court to have the will established. On that ground, therefore, I overrule the demurrer, but it will be without costs, of course.

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therefore the court, before it does any thing prejudicial to him, gives him the opportunity of contesting it. The following are cases illustrating this principle, where the court had regard to the interest of both parties. *French v. Baron*, Dick. 138; *Cator v. Butler*, Id. 438; *Bannister v. Wood*, Id. 599; *Winfield v. Lambert*, Id. 337; *Wood v. Stane*, 8 Price, 613; *Talbot v. Earl Radnor*, 3 My. & K. 252; *Tatham v. Wright*, 2 Russ. & M. 13; and *Blake v. Forster*, 2 Ball & B. 387. [He referred also to the form of decree to establish a will, *Seaton*, 82.]

*Younge* (with him) referred to the fourth report of the Commissioners on the Law of Real Property, pp. 25, 37, and to 2 Story's Eq. Jur. 4th ed. pl. 1447, and note. He produced also an extract of the case of *Mackrell v. Hunt*, (*ubi sup.*) from Reg. Lib., the substance of which is stated by the Lord-Chancellor and Sir G. J. Turner, L. J., in their judgments.

[KNIGHT BRUCE, L. C. There is no reason for the limited jurisdiction that would not be in favor of making it universal: the heir in each case says the will is invalid. I want to hear a reason why the rule should be limited by the example. The jurisdiction is useful, and, to my mind, the only wonder is, that it is confined to cases of wills, and not extended to all instruments liable to be contested. What is it to the heir at law whether the instrument which he alleges to be invalid, raises trusts or not?]

*Prior* (with them) referred to *Sheffield v. The Duchess of Buckinghamshire*, 1 Atk. 628.

*The Solicitor-General.* There is a fallacy in the argument of the other side. They admit that this court has jurisdiction to establish the will when that is incidental to the performance of something else asked by the bill; but I submit that such a suit is divided into two parts—one, in which the heir at law is interested, the other, in which he is not interested; it is bounded, as to the heir at law, to the question of the validity of the will; with the other matters he has nothing whatever to do; and when the will is established, the heir at law is dismissed. The other side wish your lordships to infer a universal negative proposition from a series of affirmative ones; but the cases upon which they have relied, cannot be understood without assuming that there is a jurisdiction in this court as between the devisee and the heir at law. The origin of this jurisdiction may have been this. The heir at law, according to the common law, might exercise his own judgment as to when or how he would have the question of the invalidity of the will tried; he was, therefore, under great advantages, as he might wait until the evidence in support of the will was lost; but the court of equity has allowed the devisee to come here to have that question decided, which ought not to be left undecided.

[LORD CHANCELLOR. I do not see that inequality; for if the devisee was in possession, and feared that the will might, at some future time, be contested, he might come here to perpetuate testimony; and

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if the heir at law was in possession, the devisee might lie by until the evidence against the validity of the will was lost. It seems strange, if the devisee is entitled to have the more effectual remedy by such a bill as the present, that devisees should have resorted to bills to perpetuate testimony. I see that the Vice-Chancellor deals with that point in his judgment, but he falls into a mistake when he says that the defendant could not cross-examine the witnesses.]

The Vice-Chancellor meant "so effectually." *Angell v. Angell*, 1 Sim. & S. 83.

*Cairns*. I submit that there is in this court an inherent jurisdiction to establish wills of real estate against the heir at law; and that where, in modern times, you find instances of the will being established in cases where there happened to be devises upon trust, you are to take those cases, not as exceptional, but as a part of the *a priori* and larger jurisdiction. The other side say, that if our proposition be correct, there would be authorities in favor of it; and, we submit that the early cases referred to by Sir W. P. Wood, V. C., in his judgment, are distinct authorities that, at that early time, this court assumed very great general authority in establishing wills of real estate. But, then, the case of *Kerrick v. Bransby*, 3 Bro. P. C. 358, altered the practice, and, instead of this court deciding on the validity of wills, the practice has been to send an issue to a court of law. I submit that none of the cases cited by the other side, prove the existence of the distinction contended for. In *Burney v. Eyre*, 3 Atk. 387, there is no allusion whatever to the existence of any trust. In *Bootle v. Blundell*, 19 Ves. 494, Lord Eldon speaks without any qualification of "an establishing bill." Surely, that generic name would not have been given to it unless it was a bill for that particular purpose. No one can read Lord Cottenham's observations, in *Grove v. Bastard*, 2 Ph. 619, and suppose, for a moment, that he had in his mind any idea that he was dealing with a case of trusts; he was not called upon to execute the trusts; they were being executed out of court, and he put it simply by analogy to a Scotch "declarator;" his decision, therefore, cannot be limited to a case of trusts. Upon what principle, then, is the jurisdiction to be limited? If it is upon the principle that there are trusts to be executed, why is not the jurisdiction to be extended to a deed creating trusts, which deed is liable to be contested? Why is not an heir in tail to be brought before the court to have a disentailing deed, containing trusts, established against him? Could the extinction of the trust, after the issue has been tried, be pleaded as a good plea *puis darrein continuance*? This argument, therefore, proves too much. Then, the other side say, that if this bill, by a devisee in possession, be right, there would be no reciprocity in favor of an heir in possession. I do not admit that; for Lord Eldon, in *Pemberton v. Pemberton*, 13 Ves. 290, speaking of the right of heirs at law to file a bill to set aside a will, says: "I will not say that in some cases they may not apply to have a will delivered up, as an instrument that ought not to vex their title." But, suppose there is no reciprocity for the heir at law in such a case as the present,

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would there be such reciprocity for the heir in the case of a devise upon trusts? The argument of reciprocity, therefore, also proves too much. Can the decree in Ireland be considered a bar to this suit? I submit not, for it is well settled that a decree is only a good bar to a suit where two things concur—first, the subject-matter of the suits must be the same; and, secondly, the court making the decree must have complete jurisdiction. *Ricardo v. Garcias*, 12 Cl. & Fin. 368; Story's Conf. Laws, ss. 543, 551, 552; *Pike v. Hoare*, Amb. 428; the opinion of Charles York, 1 Col. Jur. 248; *Lord Dillon v. Alvares*, 4 Ves. 357.

*Swanston*, in reply. I deny the existence of the general jurisdiction asserted by the other side. It would be against first principles. One party being in possession, and the other out of possession, upon what principles of equity is this court to compel either party to litigate? I submit that this court will not interfere with the law, unless upon some equitable principles. In *Simpson v. Lord Howden*, 3 My. & C. 108, Lord Cottenham says: "Why should a court of equity in this case assume to itself the decision of a mere legal question, contrary to its usual practice?" I say that the ground for the distinction between a bill to establish a will, where there are trusts, and where there are none, is this—that in the one case the ancestor, under whom both parties claim, has created a trust which the court is called upon to execute. There could be no advantage in a bill for perpetuating testimony over a bill to establish, unless the will was fraudulent. And the judgment of the Vice-Chancellor, on this point, seems to make it necessary to assume the existence of a practice favorable to fraudulent wills.

[KNIGHT BRUCE, L. J. A bill to perpetuate testimony can scarcely be considered a litigation, but a bill to establish a will is a decided litigation, since *Kerrick v. Bransby*, *ubi sup.*]

Mr. Cairns has contended that my argument proves too much but I submit that the distinction upon which I rely, exactly points to the cardinal point of the case. The court, in the case in which I admit the jurisdiction, must execute the trust. If I could put the case of an equitable heir, the analogy would be perfect, and the reciprocity complete; but it is the very absence of this equity that excludes the heir.

[LORD CHANCELLOR. Suppose a devise of Blackacre to A, upon certain trusts, and a devise of Whiteacre to B, in fee, and there is a bill to carry into execution the trusts of Blackacre, what is the form of the issue in such a case? Is it *devisavit vel non* as to Blackacre, or generally?]

Generally; the issue does not try the particular devise, but the validity of the will. [He referred to *Strickland v. Strickland*, 6 Beav. 77.]

The *Solicitor-General*, in reply upon *Strickland v. Strickland*, said that the question there was not between a devisee and the heir, but in effect between devisee and devisee, the heir at law being a devisee; and that the point about establishing the will against the heir at law was never, for a moment, alluded to.

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*Swanston.* The heir at law, though a devisee, would take under his better title.

*February 11.* LORD CHANCELLOR, (LORD CRANWORTH.) The question in this case is, whether the legal devisee of real estate, devised to him not upon trust, but for his own benefit, can file a bill against the heir praying to have the will established. This question arose upon a demurrer that was heard before Sir W. P. Wood, V. C., in the last year, and the Vice-Chancellor overruled the demurrer. There were certain minor questions, but as we have all come to the conclusion which the Vice-Chancellor did, that such a bill can be sustained, it is quite idle to discuss whether or not there is on the face of the bill something that might have sustained it if we had not gone along with the Vice-Chancellor in his general view of the case; and I shall assume, therefore, that that is the only question which we have to determine. Now, I may begin by saying that the Vice-Chancellor went so very fully into the authorities, and commented upon them with so very much ability, that I was at one time disposed to deal with this question merely as the house of lords has sometimes been in the habit of doing when they entirely affirm that which has taken place in the court below, and simply to say I agree (speaking for myself) with the judgment below, and to say no more. But rather distrusting myself, and fearing that it might be thought I had not given the subject the full attention which it deserved, if I took that course, I have thought it necessary shortly to state what are the grounds on which I arrive at the conclusion at which the Vice-Chancellor has arrived. Now, *prima facie*, an heir at law, like any other person, has a right to choose his own time for asserting his rights; and, therefore, when any one contends that he has a right to say to the heir at law, "If you do not assert your right now, you shall never assert it," he has a right to call upon the court to say that the burden of proving that any such right exists is on the party making such an assertion; and the question is, whether it is established by the plaintiff in this case, that the devisee has, on principle or authority, such a right. No general principle can be said to exist that enables a party at all times to say to every person who has or who may have an adverse claim against him, that he must assert it at any particular time.

There is that case which was referred to in the argument by Sir G. J. Turner, L. J., of *Baker v. Shelbourne*, an old case in the Cases in Chancery. That was the case of an apprentice, who, after his time was out, filed a bill against his master to compel him to sue him on covenants alleged to have been broken, then, or not to sue at all; and the court sustained such a bill. Whether it might or not have been useful to have adopted that as an universal rule, to have some limit fixed within which parties might have asserted their rights, I do not stop to speculate. I cannot find that that, as an universal and general principle, has been acted upon; but there is a class of cases in which it has been acted upon universally, that if one may take the volumes of equity cases, you will find that one half the cases con-

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sist of cases of the nature to which I am about to refer. I mean the common case of bills filed by parties to establish wills, and to have the trusts carried into execution. Those are all cases of parties filing a bill to compel the heir at law to assert his right at the time at which it is convenient for the plaintiff that it shall be asserted, instead of leaving it to him to assert it at the time he shall choose for himself. Those are, I need not say, the commonest class of bills that are known in this court. Now, I must confess that I cannot satisfy myself as to what has been the origin of the jurisdiction. Whether further antiquarian research might have led me to a conclusion on that subject more satisfactory to my own mind or not, I am not able to say. I see that the Vice-Chancellor seems to think, that in all probability it arose from the circumstance that originally all devises were necessarily cognizable in this court only, because, putting aside customary lands, devises could only be declarations of uses upon feoffments that had been made of land; and before the Statute of Uses, when they were in the nature of what are now called trusts, they came of course to be decided in this court, and in this court only. Whether that was the origin, I know not. I am not at all satisfied that it might not be on a different principle, namely, this — with respect to personal estate, there was, from the earliest times, a mode of at once forcing a party, who asserted, or might assert, that a deceased person had died intestate, to litigate that question of testacy or intestacy, and to have it decided at once. I am not clear that, referring to personal estate, it might not have been, whether rightly or wrongly, *per fas* or *per nefas*, convenient to mankind that that course should be adopted with respect to real estate as well as personal estate. It may be that the court took upon itself the right to exercise the jurisdiction, and has exercised it so long that the right to exercise it can no longer be questioned.

But putting aside that antiquarian view, the real question is, whether the cases which have been decided, (of which there are authorities innumerable,) that bills may be filed compelling the heir at law to litigate the question at once, or not at all, when there is a devise in trust, govern the case when there is no trust. Now, the defendant in this case, who has demurred, says they, do not govern such a case, because the ground of interference in the case of a devise of trusts is the necessity of the case, for that, without such an establishment of the will, the court cannot safely execute the trusts. Now, I confess that appears to me a most unsatisfactory distinction, and in fact no explanation at all, because the legal right which is interfered with is paramount to the question of trust or no trust. It is the legal right of a party claiming adverse to both — the legal right of the heir, he being an entire stranger to what the objects of the trusts are. The grievance to him, if it be a grievance, is, that he is compelled to litigate, not at the time he thinks fit. Then the nature of the interest of the opposing party is to him perfectly immaterial. A will may contain, and almost always does contain, devises upon trust, and legal beneficial devises also, very likely to the same person. In such a case, the title of the devisee to establish the will could not

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be controverted, and such a bill will enure, as to both the parties, both as to that which is devised to him in trust, and as to that which is devised to him beneficially, for the decree is, that the will is well proved — that is, the whole will. The will, therefore, may be established in favor of a legal devisee, if there is any devise to him on trusts; and it seems to my mind absurd that any right to establish the will in respect of my interest as legal devisee of Blackacre shall depend on there being another devise of Whiteacre to me on certain trusts. In the case of an alleged devise on trusts, the assertion of the claimant is, that the deceased has, by his will, given the estate in question subject to the discharge of certain duties. If there are no trusts, his assertion is, that the deceased has given him an estate for his own benefit, and without any devise attached to it; and in this respect the two claims differ. But the proposition of the heir is in both cases precisely the same. He says: "I deny that the deceased has given you the estate at all." Surely, when it is once established in the former case that the heir may be called upon to litigate the adverse right at the wish of the party asserting it, the consequence must be that the same privilege exists in the latter case also. The objection is, that such a bill is an interference with the adverse right of the heir. As this interference is not a valid objection in the one case, I do not see how it can be so in the other. To the heir, the two cases are identical.

But then it was said, whatever may be the theory on the subject, the authorities are opposed; there is no precedent for such a bill, and the precedents are against it. This brings me to consider what the authorities are, and how far they really bear on the case; for I admit, that although principle may be in favor of such a construction as I am led to put on it, yet, if authority runs in a contrary direction, it is just one of those cases in which I should bow to authority. Now, it is admitted that there is no direct authority—at least, I assume for the present that there is no direct authority. I am aware that it will not perhaps be admitted to be quite correct to say there are no authorities, but at present I will assume there are no authorities. I will pass over that for the present, and will advert to it presently. Independently, however, of the question, whether there is any authority or not in favor of the conclusion of the defendant, there are, at all events, many authorities relied on of a negative character. In the first place, Mr. Swanston relied very much—I need not say he put the argument very strongly and very forcibly, and at one time it very much influenced my mind, and led me to have some doubt upon the subject—he relied very much on what is said by Lord Redesdale in *Mitford on Pleading*, and that Lord Redesdale speaks there of the different sorts of bills, and mentions bills to perpetuate testimony, and bills to establish and carry into execution the trusts of a will of real estate, but he makes no mention of bills merely to establish. That no doubt is so, but I conceive that may be explained. Mentioning bills to establish and carry trusts into execution may be explained by the fact that that constitutes so very large a portion of bills to establish, that he instances that which is the common case—

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the case of 99 out of 100, and probably of 999 out of 1,000. He speaks of them as illustrated by that which is the common and well-known bill of that description. The passage in Lord Redesdale's treatise is this (p. 139): "To a bill to carry into execution the trusts of a will disposing of real estate by sale or charge of the estate, the heir at law of the testator is deemed a necessary party, that the title may be quieted against his demand, for which purpose the bill usually prays that the will may be established against him by the decree of the court; but if the testator has made a prior will, containing a different disposition of the same property, and which remains uncanceled and has not been revoked except by the subsequent will, it has not been deemed necessary to make the persons claiming under the prior will parties; though, if the subsequent will be not valid, those persons may disturb the title under it, as well as the heir of the testator. If, however, the prior will is insisted upon as an effective instrument, notwithstanding the subsequent will, the persons claiming under it may be brought before the court to quiet the title, and protect those who may act under the orders of the court in executing the latter instrument." Then he says, if there is no heir at law, you can make the attorney-general a party; and if the heir is abroad, although the court may not decree or declare the will well proved against the heir, it will execute the trusts. Now, Lord Redesdale was there showing that a court of equity requires all persons interested to be parties. He shows in the prior passage that all residuary legatees must be parties, and all parties claiming the proceeds of the real estate when sold; and then he explains the nature, extent, and qualifications of the rule; then he proceeds to that passage which I have read, and which is relied upon; but it does not appear to me that that passage necessarily, or even naturally, implies that the existence of the trust is a condition without which the court could not establish the will. It may well imply, that whereas all parties acting under a will may either rely on the will, as on any other instrument, or may in the first instance establish it conclusively, as probate does in respect of personal estate, the parties may generally do that; but that being what the parties may do, the rule of the court is, never to act on the will without first establishing it, unless there are special reasons for so doing; and I cannot help thinking, that if Lord Redesdale had understood that the existence of a trust was a necessary condition precedent to the right of establishing the will, he would have enunciated that as a distinct proposition, and not have left it to mere inference.

Mr. Swanston relied also upon a case before that very learned judge, in Ireland, of *Devonshire v. Nevenham*, 2 Sch. & L. 199, as confirmatory of the view which he supposes to be fairly deducible from that passage in Lord Redesdale's treatise on pleading. I have attentively considered that case, but I cannot think that it bears out any such proposition. That was the case of a bill to establish and carry into execution the trusts of a will of real estate; and one party, who was made a party defendant, was a person who demurred on the ground that he had no interest, and ought not to have been made

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a party under these circumstances. The testator had been tenant in tail, but he suffered a recovery, which barred the entail, unless there was some defect in the recovery, and devised the estate. The bill was filed by the parties claiming under those devises, one of them, and the principal party interested, in truth, being the heir in tail of the testator, who was entitled *quacumque via*. Either he was heir in tail if there was no valid recovery suffered, or he was devisee if there was a valid recovery, and so he would claim the interest, or the main part of the interest, under the will; but in filing a bill to establish and carry into execution the trusts of that will, the parties made as a codefendant the person who would have been entitled as tenant in tail in remainder, in case the recovery was not well suffered; but Lord Redesdale held that he could not be called on to answer, and that it was a novelty, as was pointed out. In the first place, there was no suggestion of any reason why the recovery was not a valid recovery. He said: "I would not listen to such a suggestion on a bill, as a doubt whether Saltarum's case was rightly decided, and whether a common recovery would bar a tenancy in tail." Therefore, he said, there is no pretence for any such suggestion, and this party might properly have demurred; and he points out, that, at all events, he was only tenant in tail in remainder, expectant upon the interest of the tenant in tail, who was Pelham; and, in truth, there was no tenancy in tail in existence, for it had been barred. It is true, that was the case of a bill to establish and carry into execution the trusts of a will; therefore, it is no authority in favor that such a bill as this may be filed if there were no trusts, but leaves that question entirely untouched. A great number of authorities were cited, which I confess I thought had but small bearing on the case, from Dickens's Reports, to show when the court would proceed to execute the trusts of a will without the presence of the heir at law. A well-known exception is, that if you cannot get the heir at law, the court will still execute the trusts, although you cannot, in the absence, of the heir at law, bind him. Other cases were cited on other branches of the argument, which I will not advert to now.

But I will advert to what was the next argument deduced from the supposed negative authority of Lord Redesdale. It was this. It was said, although there is no direct authority, strong inference may be deduced from this fact — that there are innumerable cases of bills to perpetuate testimony. Now, it is said such bills never would have been filed if parties might have filed such a bill as the bill now under consideration; that if parties could have established the will at once, they never would have filed bills merely to perpetuate testimony; that such bills are very frequent; for that we do not want any authority, but we were reminded of this — that it has given rise to the common expression of "a will proved in chancery." I confess that argument also struck me as being entitled to very considerable weight; and I do not know that I can show quite satisfactorily to my own mind, why it is that parties have had recourse to such bills when they might have had bills to establish wills. But I think I see some reason. In the first place, it was an infinitely less expensive mode,

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because there was no bringing the bill to a hearing at all. It is true that the party had to pay the costs of filing the bill and examining witnesses, but he had not to incur the costs of a hearing, at all events, and thus he was saved a good deal of expense. At the same time, I must make this remark — that when we find, in old authorities of a century and a half ago, reference to bills for “proving a will in chancery,” I should quite concur in an observation made by Sir W. P. Wood, V. C., in his judgment in this case, that we must not always understand the court as meaning bills to perpetuate testimony. It is quite clear that that expression, “a bill to prove a will in chancery,” was used 150 years ago in a very vague sense. It often meant what I consider to be bills such as that now under discussion. In a case referred to in the argument of *Cotton v. Wilson*, before Lord Talbot, in the year 1733, this occurs. This was a bill to establish a will, and to carry the trusts into execution, but the heir was not a party. There was some reason why he could not be made a party; I think, he was abroad; and then “the will was proved in this court to be duly executed; but the heir, who was beyond sea, in the East India Company’s service, though made a party defendant, yet had not appeared to or answered the bill; and the defendant, Wilson, though he was at first willing to purchase the premises, and had entered on good part thereof, yet other part of this estate, on which he had not entered, being much out of repair, the tenants racked, and the rents likely to fall, he was now desirous of being discharged from his purchase; and it was on his behalf insisted, that this being the case of a will not proved in equity against the heir, it was a defective title.” Now, certainly, the reporter there is speaking of a will proved in equity, not as a will in respect of which there had been a bill filed to perpetuate testimony, but a bill in respect of which there had been a decree establishing the will; and then he goes on to show why it was contended that the purchaser ought not to have been compelled to complete his purchase. But the Lord Chancellor says: “It is very proper that a will disposing of land should be proved in equity, especially in the case of a modern will.” Now, there it is quite clear, that neither the reporter in his report of the argument, nor the Lord Chancellor in his judgment, was speaking of a bill to perpetuate testimony of witnesses — they were talking of a will proved in chancery as a will established by the decree of the Court of Chancery. And in confirmation of this, I must observe that nothing is more common in old cases, and in books of the highest authority, than to see it stated, that, in order to dispense with the heir at law concurring in the conveyance by a devisee, it is useful and proper to have the will proved in chancery. That is stated, I think, by Lord St. Leonards in his work, and in much earlier works, and you see it continually stated. I therefore cannot think, that when you find that statement made, it is to be assumed that the parties meant bills to perpetuate testimony. That might dispense with the concurrence of the heir at law, or it might not, because nobody can know what it is the witnesses have stated. It is no security at all. It might be rather better if you have got honest witnesses upon whom you can rely, and it may be an

advantage to have the decree recorded; but how do you know that that will dispense with the concurrence of the heir at law? In order to render the heir at law's concurrence unnecessary, if you have not his concurrence, what you must do is something that will prevent his disputing it hereafter. That could only be by a bill to establish the will; and when you see in old cases such frequent mention of the proposition that purchasers ought to have, particularly in recent wills, the concurrence of the heir, or have the will proved in chancery, I believe what is there referred to is, not what Blackstone and other writers say is the meaning of ordinarily proving a will in chancery, namely, a decree to perpetuate testimony, but a decree establishing the will against the heir at law, so as to prevent him from afterwards disputing it. But whether that be the correct view of the cases or not, I have certainly come to this conclusion—that I do not think that, because there is a particular proceeding which may be resorted to, and which is not that proceeding which is adopted in this case—not equally beneficial, and which has very often been resorted to—I do not think that is a sufficient argument to weigh against the fact, that proceedings to establish wills have been of the commonest description when there are trusts, and that there is no real distinction between the case of there being trusts and there being none.

Now, it is stated that there are no authorities (putting the very recent cases out of the question) in favour of such a proposition as is now contended for. Perhaps that may be true—that is to say, no case has been quoted in which the real question has been discussed and decided; but I think there is a great deal of authority from which it may be inferred that that was the view taken by the court. For, in the first place, there is that very case of *Cotton v. Wilson*. It is true there was a will there in which there were trusts. The language of the Lord Chancellor seems not to have adverted to the circumstance of the trusts being material, but to have been founded upon considerations which would naturally give the go-by to any such question. But then there is also that case of *Berney v. Eyre*, 3 Atk. 387, the note of which is very short, and in which Lord Hardwicke lays down the following general rules: "If a devisee brings a bill merely in *perpetuam rei memoriam*, and the heir at law does nothing more than cross-examine the witnesses who are produced to confirm the will, he is entitled to his costs. If he examines witnesses to encounter the will, then he shall not have his costs. This is where the bill does not pray relief, or is not brought to a hearing." What bill not brought to a hearing? A bill in *perpetuam rei memoriam*. Therefore, Lord Hardwicke clearly considers that a bill in *perpetuam rei memoriam* may be brought to a hearing; from which I infer that Lord Hardwicke thought that a man might file a bill either to perpetuate testimony, and then certain consequences follow about the costs, or he may bring such a bill—that is, a bill which has no other object than to establish the will in *perpetuam rei memoriam* by decree, that he might bring it to a hearing. Then he goes on to show there might be a different rule as to costs. The heir at law, then, has certain rights which he may insist upon, because he

is barred by the proceeding, which is a proceeding out of the common course. That I think, therefore, is a strong authority to show what the understanding of Lord Hardwicke was.

But there is another case—a very loose note, it is true, but still one which throws considerable light on this point—also before that most eminent judge. I allude to the case of *Lewis v. Nangle*, 2 Ves. sen. 431, which was a bill filed by the devisee of an equity of redemption to redeem, and the objection was made that he had not made the heir at law a party. What does Lord Hardwicke say to that? It is not in every case, he says, that a devisee of an equity of redemption need bring the heir at law before the court. He need do that only when his object is to establish the will against the heir. The observation made on that is, peradventure Lord Hardwicke only referred to cases where there might have been trusts. I think that is a very strange interpretation of that expression, because one does not very well see what the case would be where the devisee of an equity of redemption would have had any thing to do with the trusts of the will. He claims, independently of all those trusts, by a title paramount. It seems to me, therefore, that that case is very strong to show, as also is the case of *Berney v. Eyre*, that Lord Hardwicke did not understand that there was any such necessity for the existence of trusts, in order to enable a devisee to establish a will. I do not rely very much upon the circumstance—but it is a considerable circumstance—that Lord Eldon, in the case of *Bootle v. Blundell*, which was referred to, alludes to bills to establish wills as if they had acquired a sort of generic or specific name—"an establishing bill." And, again: the observation may be made that Lord Eldon only meant, to establish if there were trusts to be carried into execution. It may be so; but I can only say of him, as of Lord Hardwicke, that there is not the least trace of any such distinction having been present to his mind. Well, those authorities seem strongly to indicate that Lord Talbot, from the case of *Cotton v. Wilson*, Lord Hardwicke, from those cases of *Berney v. Eyre*, and *Lewis v. Nangle*, and Lord Eldon, from the case of *Bootle v. Blundell*, considered it as the elementary doctrine of this court that such bills might be sustained.

But, then comes two cases which are the nearest—I can hardly treat them as any thing else than decided authorities in modern times in favor of such a bill—I mean the cases of *Grove v. Bastard*, and *Grove v. Young*. I meant to have brought them down, but I believe I have them sufficiently accurate in my mind to state what those cases decided, and they seem to me to be almost decisive authorities upon the point. There had been a decision by my learned brother, Sir J. L. Knight Bruce, L. J., when Vice-Chancellor, decreeing specific performance of a contract which had been entered into for the sale of an estate which had been devised. There was a question whether that will had not been obtained unduly, so as to make it not a will that could be supported. There was an appeal to Lord Cottenham; and Lord Cottenham, though expressing no opinion whether the preponderance of evidence was one way or another, thought that this was a case in which the court was not driven to the inconveni-

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ence (to give it no other name) of deciding that a party must take a title in the absence of somebody, who may afterwards controvert that proposition; because, he says, this is a case in which we can get rid of all difficulty of that sort, because we may refuse to decree specific performance until the will has been established. Now, it is perfectly true, that in that case there were trusts. I think the sale was under a trust; but Lord Cottenham does not advert to that, and he decides, therefore, that there must be a bill filed to establish that will. A bill was accordingly filed, and I think I am right in saying, (if I am not, I shall be glad to be set right,) that in that bill, although the will contained a devise on trust, there were no trusts of the will that remained to be executed, and the bill that was filed to establish the will, did not advert to the trusts; therefore, a demurrer would have lain to that bill if it would lie to this bill; because although, if the will had been properly stated, there would have appeared to be trusts, yet no such statement was made, and the will was upon that bill finally established. That is exactly the present case. It may be that that was wrongly decided—that was open to the learned counsel to contend; but, unless that was so, I do not see why it is not a distinct authority in favor of the proposition now before us. The view, therefore, that I take of the case is, that the immense number of bills that have been filed to establish wills, and to carry the trusts into execution, unless there is something to distinguish them more than has yet been shown to me, are authorities in favor of bills to establish, where there are no trusts to execute; and I have pointed out why I think what has been relied upon as authority, by inference, against that proposition, ought to be entitled to no weight, and why I think there are, in truth, authorities, not direct, but strongly indicating the opinion of successive chancellors, that such bills may be maintained, independent of that recent authority of *Grove v. Young*, which is a decided authority on the subject.

Now, I said there was no direct authority in favor of the proposition of the defendants, but I meant to say no direct authority except two, which were relied upon by Mr. Swanston as being authorities directly in point. One is that case in the note, 2 Mad. 34, (and of which Mr. Younge has furnished a note from the Registrar's Book,) of *Mackrell v. Hunt*, or rather of *Fludyer v. Montague*, which was the case there referred to; and that was this case. It appeared that the testator had made a will, by which he made a devise, which, I suppose, must be taken to be a legal devise. There had been a great deal of dealing by the devisee with that property. A mortgage for years had been created, it appears, which was afterwards foreclosed, so that the mortgagee became in the nature of a purchaser of a leasehold interest (some 500 years) in this property so devised; and afterwards that mortgagee, who had so become owner, died, and then, by his will, he disposed of the leasehold interest which he had so acquired. A bill was then filed by his next of kin, or residuary legatees, against his executors, to carry into execution the trusts of his will, and, under that decree, Fludyer became the purchaser of this leasehold interest, and Fludyer, wishing to have his title made secure,

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filed a bill against the heir of the original testator, and the will was established, I think. It turned out that there had been some question whether the testator was of sound mind, but the will was established, and then came the question in the cause, a note of which is in 2 Mad., who was to bear the costs of that bill which had been so filed by Fludyer. When I say the will was established, the witnesses were examined, but, when the cause came on for hearing before the Master of the Rolls of that day, the Master of the Rolls dismissed the bill, but without prejudice to perpetuating testimony. Lord Hardwicke afterwards said the reservation was quite unnecessary. He says it was right to dismiss the bill, but it was not necessary to make that reservation, for the testimony would perpetuate itself. Then came the question, who should bear the costs of that bill; and it was decided that the costs should be apportioned, on the principle of *Berney v. Eyre*. The purchaser had so much of the costs as were necessary to perfect his title, but certain other of the costs he did not receive. Then, the authority that is relied on is this — that the Master of the Rolls had dismissed the bill, subject to a restriction which Lord Hardwicke said was not necessary, and so the bill was dismissed. Except that the bill was dismissed, it is no authority at all. Now, unfortunately, we have no report of any argument in the case. We do not know on what ground it was that this bill was dismissed. Undoubtedly, if it was a decision that the bill was to be dismissed because there were no trusts in the original will, that would come exactly to the very point now in dispute; but that is not stated, and I cannot come to any satisfactory conclusion as to what the ground was. It might have proceeded upon different grounds. The Master of the Rolls first thought, and Lord Hardwicke may have thought afterwards, that a party who had merely entered into a contract to purchase a leasehold interest that was derived under a will, under which parties had been acting for a great number of years, had not such an interest which entitled him, where he was merely a contracting party, to file such a bill. That might have been the ground. In truth, it can hardly be taken as a decision of Lord Hardwicke. I do not know who the Master of the Rolls of the day was, but I assume him to be of equal authority with Lord Hardwicke. Lord Hardwicke says there was no necessity to make such a reservation as that; the dismissal of that bill, he says, was right. He merely adopts that decision, and on what ground we do not know. Now, I consider that whether we suppose it to have been on that ground, or whatever may be the attempted explanation of it, it would be far too much to rely on so very loose and unsatisfactory a note as that is, to account for a proposition so important, and, as I think, so much at variance with the other authorities.

The other authority which is relied upon does not touch the case, the authority, before Lord Langdale, of *Strickland v. Strickland*, 6 Beav. 77, for that was merely the case of a legal devise out of possession filing a bill against the heir, who was in possession, and the bill prayed certain relief. Lord Langdale held, that as he was a mere legal devisee, and there was no impediment to prevent the trial at

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law, his course was to recover possession by ejectment, and that the court had no jurisdiction. I do not think that at all helps the case. It appears to me, therefore, that the decree below was right, and right on these grounds, because such bills by devisees having trusts to execute are of every-day occurrence; that to the heir at law it is of no importance whatever whether the devisee is to recover for his own use, or for the benefit of others; that bills, therefore, by devisees in trust to carry into execution trusts, are conclusive authorities in favor of the present bill; and that, even if there were no authorities directly in point, yet the language of Lord Talbot, Lord Hardwicke, Lord Eldon, Lord Cottenham, and Sir J. Parker, seems to me to indicate decisive opinions in favor of such a bill; and, on these grounds, I think the judgment of the court below was perfectly right, and ought to be affirmed.

Knight Bruce, L. J. Without asserting or denying that the bill in this case ought to be considered as in the nature of a cross bill, or that the settlement alleged to have been executed by the plaintiff, or the 50th section, or any other provision of the statute of 1852, (15 & 16 Vict. c. 86,) for amending our practice and course of proceeding here, assists the plaintiff — I assume each of those points to be against her — I doubted whether it was arguable, that by the Irish decree stated on the record, notwithstanding the appeal to the House of Lords, her right of suing in respect even of English land, as devisee of the alleged testator, was defeated or suspended. The bill, however, seems to me, at present, to be so framed as to exclude a demurrer, on the grounds *rei judicatae*, or of the pendency of another suit; but I wish to be understood as not binding myself upon the question of the materiality, or immateriality of the Irish proceedings at some future stage of this cause; that is to say, as not intimating any opinion whether by reason of them it may or may not be right hereafter to decide against the plaintiff. With regard to the allegations respecting the heirship, they are sufficient against the defendants. There remains but the point mainly if not solely argued before us — a point as to which some text-books of merit, including the excellent treatise of Lord Redesdale, may, perhaps, be thought to have afforded to the defendants plausible grounds of debate. The proceeding in equity to establish an alleged will of real estate against an heir out of possession is not wholly, if it is in any sense, or to any extent, for his benefit. His consent is not required, nor his dissent regarded. It is in vain for him, with whatsoever truth, to say to the court, "I am not, and the plaintiffs, or those in the same interest with them, and adverse altogether to me, are, in possession of what is claimed. I am not disturbed, nor am I disturbing any of them. Nineteen years or more have yet to elapse, during which I may be quiescent, without incurring a statutory bar. I may or may not sue hereafter. I know not whether I shall. I know not whether the alleged will is good or bad. I shall probably, some years hence, be better able to support the expense of a lawsuit than I am at present. When I shall embark in litigation, if at all, I shall prefer, upon a question purely legal, the exclusive ad-

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ministration of justice by a court of law, which, in the event of my failure in an action of ejectment, though on the merits, will certainly allow me to bring one or two more ; whereas, in an establishing bill, the question, whether there shall be a second trial, will or may rest exclusively with the Court of Chancery, which may bind the right by one." All this, I repeat, amounts to nothing. Brought hither, he must try within the time here thought reasonable, or be forever precluded ; and trying, he may possibly be conclusively barred by the result of one trial — as to which I need not refer to *Walters v. Walters*, 2 De G. & S. 591, decided by myself, or to the authorities that preceded it. Now, this course, this manner of proceeding against an heir, may seem to some persons harsh, practically, and not, upon principles of legal science, justifiable ; but others may think, and probably without error, differently — may consider, and probably with correctness, that so to proceed is convenient, is in accordance with sound maxims of jurisprudence, is consistent with the enlightened administration of justice, and not without support analogically from things habitually and familiarly done in more than one branch of English judicature.

These observations I make, if not with more certainty, not with less confidence, by reason of the recent act of parliament that has just been mentioned. It is clearly proved, by a long course of usage and practice, that the jurisdiction to which I have been alluding — a jurisdiction, namely, to establish wills of real estates against heirs at law out of possession — a jurisdiction exceeding materially the mere perpetuation of testimony — exists in the Court of Chancery ; nor has this proposition been denied. The argument, based to a certain extent on the language of a highly esteemed text-book, to which I have before referred, has been, that it is a jurisdiction exercisable only in certain cases — exercisable in those instances where the will, if valid, creates a trust of real estate, within the province of the court, as a court for administering trusts, to carry into execution, but not exercisable in the case of a will of the simple description of that attributed to the alleged testator in the present cause, creating neither charge nor trust. Upon what principle, or reason, however, not applicable to each case, the jurisdiction can have been exercised in either, I have been, and remain, unable to discover. Where an instrument, alleged to be an effectual will of freehold estate, does, if valid, disinherit the heir altogether, not merely as to all legal, but also as to all beneficial interest, and the heir says that the will is a forgery, or void against him on the ground of fraud, or insanity, or an insufficient attestation, or want of signature, and there is no other question with him, how can he be, rationally, at least — how can he be, consistently with principle or analogy, held liable or not liable to a particular jurisdiction, as the contents of the alleged will may be of one kind or another — may purport to create, or not to create a charge, or a trust ? Let me state a case. A, out of possession, claims to be of right immediately entitled, legally and beneficially, in fee-simple, to Blackacre and Whiteacre, and alleges an intention, at some future time to sue for recovering each. This claim is adverse to all other persons whomsoever. Blackacre is in the possession of B, who professes to be, and, if A has not

the title alleged by him, is rightfully, seised in fee of it, in trust to pay the debt of C, and subject to that, in trust for C and D; an assertion in which C and his creditors and D concur. Whiteacre is in the possession of E, who professes to be, and, if A has not the title alleged by him, is rightfully, seised in fee of it, for E's own use and benefit. The case as to one property is not otherwise different from the case as to the other, and there is not one material fact besides. Under such circumstances, to suggest that, for the purpose of obtaining a judicial decision against the validity of A's alleged title, he is liable to be sued by B, by C, or his creditors, or by D, as to Blackacre, but is not liable to be sued by E as to Whiteacre, is, I apprehend, to suggest something so near an absurdity as not to be distinguishable from it, and this upon grounds not less of English law than of general jurisprudence.

In suits for carrying into effect trusts created, or purporting to be created by a will of real estate wholly, and in every sense disinheriting the heir, there seem to have been several reasons, more or less sound, for making the heir, or requiring him to be made, a party, when within the jurisdiction, even though the testator had died legally as well as beneficially seised — one, that the property which might prove to be the heir's might not, to the possible embarrassment of his rights, be, without hearing him, dealt with as not belonging to him; another, that there might be a complete determination; and a third, (if not included in the second,) that purchasers, though the court does not, and did not, warrant the title of lands which it orders to be sold, and others affected by the proceedings, might, if possible, be protected from any claim of the heir at a subsequent time. But the court, I repeat, could not, as it seems to me, have justly or reasonably prescribed or allowed such a course without the heir's consent, unless upon the notion of a jurisdiction to bring him before the court for the purpose of proving, and then establishing, the will against him, arising upon the mere fact of any devise adverse to the right of the heir in that character. It has been argued, perhaps plausibly, but not so as to convince my mind, that if the bill before us is right on the point now under consideration, there could not, or would not, have been bills to perpetuate testimony as to wills of real estate by devisees in possession, of which I have seen the record of one, signed by a counsel of the sagacity and learning of the late Mr. Bell. I can, however, conceive various states of circumstances in which a devisee in possession might well be advised, even by a lawyer, believing that he might take either course, to take that of perpetuating testimony merely; and with respect to the rule of the court, I apprehend, that where a man is entitled to proceed in equity, and only in equity, for the purpose of obtaining, as a plaintiff, an adjudication upon a question of fact in which he is interested, it is competent to him to file a bill for the purpose merely of perpetuating testimony upon that question — at least, if his adversary would, whether the plaintiff at law or the defendant at law, have a good case in a court of law, either in any event, or upon the supposition of a material fact, alleged by the plaintiff in the bill for perpetuating testimony, being untrue.

It may be argued, that in the instances in which the defendants' learned counsel properly admit the existence and long exercise of the jurisdiction in question, it contravenes the maxim, "Non debet actori licere quod reo non permittitur" — is anomalous, and one rather to be restricted, than extended. But may we not respectfully ask whether it is clear that the anomaly is not the other way — whether the court, in testamentary cases, might not for the heir, and might not in cases not testamentary, have well taken the course which it has taken in those instances of establishment that are, without dispute, acknowledged? If I must either attribute to some judges a reverence more for the letter than the spirit, caution carried too far, an over-anxiousness to keep themselves within the most clearly defined limits of their authority, or ascribe to others an arbitrary and unwarrantable assumption of legislative power, I elect the former. Had I found a decision based certainly on the opinion, that though a will could be established here in the circumstances that are acknowledged, and that it could not be in such a case as the present, or in a case not substantially in this respect dissimilar, I might have deemed myself bound not to act according to my individual judgment; but I am not aware of any such decision, disbelieving, as I do, that in *Mackrell v. Hunt*, or *Fludger v. Montague*, or in *Strickland v. Strickland*, the court meant to determine any such point. Let it be assumed, though I do not assert, that the cases of *Grove v. Bastard* and *Grove v. Young* (in one of which it seems to have been adjudicated between a vendor and a purchaser that the former could sustain his contract only on the condition of obtaining the establishment of a will against an heir which the heir had failed at law, on the merits, in attempting to subvert) are of no weight or account against the present defendants — let it be assumed, though I do not represent myself as persuaded, that no instance of the exercise of the jurisdiction in question upon a simple devise of a freehold estate, without charge or trust of any kind, can be found — still, I say, borrowing from Lord Eldon's judgment in *Bax v. Whitbread*, 16 Ves. 15, I will not confine myself to the inquiry whether a case precisely the same has ever occurred, to take as my rule of acting, the circumstance, instead of the principle, decided by former cases. Why am I, without necessity and without reason, to treat the example as limiting the rule? It has been properly conceded, that the series of direct decisions establishing wills in this court — at least, those previous to 1841 — cannot be set at nought, but bind as far as they extend. If so, they must be considered not as having created, (which they could not do,) but as having obeyed law — that is to say, unwritten law. The force of authorities and precedents is not confined to cases of which all the circumstances, however accidentally, agree with theirs — to instances as like as *apis api* — but where a positive law, forbidding the extension, is not shown, they extend to those which differing in some particulars, differ in no essential circumstances, or cannot, in legal reason or legal principle, be substantially distinguished. We should otherwise, indeed, be in a dark and strange state. Lord Coke, and a celebrated Frenchman of the same age, say, "Nullum simile quatuor

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pedibus currit;" the other, "Tout exemple cloche;" and cases are continually governed in our courts by authorities, not, according to our vernacular phrase, upon all-fours with them. In the language of a distinguished jurist, "Quid enim notius et certius quam exempla non restringere regulam." And again, "Exempla non restringunt regulam sed loquuntur de casibus certioribus." It seems to me, that to accede to the defendants' view of the precedents would be unnecessarily to cripple the power of usefully administering justice — would be practically inconvenient, and theoretically wrong — would be to confound essentials and accidentals — would, in fact, be doing what Lord Eldon in *Bax v. Whitbread* so manifestly disapproves when he says: "I think it better to declare that the court will not abide by these decisions, than to overrule them in effect, professing to abide by them." So I venture to say here with respect to those almost innumerable cases upon the establishment of wills abounding in our records, of which no man disputes the soundness. This demurrer cannot stand.

TURNER, L. J. The principal question in this case is, whether it is competent to a mere legal devisee, charged with no trusts or duty, to file a bill in this court against the heir at law for the purpose of establishing the will against him. This question has been so thoroughly examined by the late learned Vice-Chancellor, that it is difficult to add any thing to his judgment upon it; and the observations which I shall make on the case will, therefore, be confined, for the most part, to the arguments by which the judgment of the Vice-Chancellor has been attempted to be impeached. It was insisted, in the first place, on the part of the appellant, that as between a mere legal devisee and the heir at law, the question of the validity of the will is purely a legal question, and one, therefore, with which this court has no concern. But although the question is undoubtedly legal, it does not at all follow that this court has no jurisdiction over it. The jurisdiction of this court extends to cases of dower and partition, where the estates to be dealt with are legal, and it is daily exercised in many matters, as to which it would be difficult, if not impossible, to trace the mode in which it originated. It cannot, therefore, as I think, be said that there is no jurisdiction in this court in such a case as the present, merely because the question to be dealt with is a legal question.

It was then, however, said on the part of the appellant—and the great weight of the appellant's arguments rested on this point—that there is no precedent for the interference of this court in such cases; that the court has never interfered to establish a will against the heir at law, except where there are trusts to be executed under the will; that the jurisdiction to establish the will is no more than an incident to the execution of the trusts; and some authorities were cited on this part of the case, to which I shall presently refer. But looking at the case without reference to the authorities, this question arises—does the fact of the jurisdiction being exercised where there are trusts to be executed under the will, negative the existence of the jurisdic-

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tion where there are no such trusts? Is the jurisdiction confined to cases in which there are trusts to be executed, or are those cases instances only of the exercise of a more extended jurisdiction? There are several points of view in which this question must be looked at. In the first place, is it the law of this court that trusts created by a will cannot be executed without the will being established against the heir at law? I do not take it to be so. If the trustee admits the will, and does not require that the heir should be brought before the court, there must necessarily, as I apprehend, be a decree to execute the trusts. The establishment of the will, therefore, is not a necessary incident to the execution of the trusts. In the second place, what is the position of the heir? He has an apparent legal right. His right, if it prevails, is something paramount to the will. He has not, and never can have, any concern with the trusts created by it. How, then, can the execution of those trusts be the foundation of the right to establish the will against him? In the third place, if the right to establish the will against the heir depends on the existence of trusts to be executed under the will, why is it that the right is not measured by the trust which is to be executed? But this is not the case. If one only of several devised estates be made subject to the trusts, the issue directed is, not whether the particular estate is well devised by the will, but a general issue *devisavit vel non*; and the decree which follows an issue, if found in the affirmative, is not a decree to establish the will as to the estate made the subject of the trust, but a general decree to establish the will. It may be said that such a decree would operate only between the parties to the suit; but suppose the bill to be filed by the *cestuis que trust* of the estates devised in trust, whose right to file it cannot be denied, and the devisees of the other estates made defendants to the bill, could the heir be permitted afterwards to bring ejectment against those other devisees? I take it to be clear he could not. Again: how does the case stand with reference to a limited trust or duty—the case, for instance, of a charge on real estate for the payment of debts? Does the court suspend its decree for the establishment of a will against the heir, until it is ascertained whether the primary fund (the personal estate) is sufficient? I have met with no such case. In the fourth place, it is difficult to see how the execution of the trusts can in any case render it necessary that the will should be established against the heir. Surely, the mere fact of the heir being a party to the suit in which the decree is made for executing the trusts must of itself be sufficient to prevent him from disputing any thing which is done under the decree. These considerations appear to me irreconcilable with the notion that this jurisdiction is confined to cases in which there are trusts to be executed under the will.

Another argument which was much relied on upon the part of the appellant was, that in the usual course of the court, bills were filed by devisees to perpetuate the testimony of witnesses to wills; and this argument was, or might have been, pressed to this extent—that bills to perpetuate testimony can only be filed where the matter in question cannot be brought to an immediate trial, and that the

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practice of filing such bills, therefore, negatives the right of bringing the validity of the will to an immediate issue, by filing a bill to establish it. But this argument proves too much; for it is not disputed that a *cestui que trust* or a devisee in trust can file a bill to establish a will, and yet it cannot be doubted that either of these parties might file a bill to perpetuate the testimony of the witnesses to the will. The existence of this right to perpetuate testimony goes far to account for the scarcity of precedents of bills to establish wills, which was also relied on by the appellant. A devisee, if in possession, is not likely to invite litigation, by filing such a bill, when he has means of securing his evidence in the event of future litigation; and a devisee out of possession has a more easy remedy by ejectment. Another argument adduced on the part of the appellant was, that if the devisee was entitled to sue the heir for the purpose of establishing the will against him, there ought to be a reciprocal right on the part of the heir, but that no such right exists. The position of the heir, however, is wholly different from that of the devisee. The heir derives his title from the law — he wants no declaration of the court to give effect to his title; but the title of the devisee depends on the act of the testator, and the declaration of this court affirms the validity of that act. These were the main arguments on which the appellant's case was rested. For the reasons I have given, they have failed to satisfy my mind that this court has not the jurisdiction for which the respondents contended.

Some authorities, however, were referred to on the part of the appellant, and it is right to examine them. The most material of them were *Mackrell v. Hunt*, *Devonshire v. Newenham*, *Lord Fingall v. Blake*, and *Strickland v. Strickland*. The case of *Mackrell v. Hunt* has been already stated by the Lord Chancellor, and I do not, therefore, think it necessary to reiterate the facts of that case. The result of the case was, that upon a bill filed by a purchaser under the decree of the court, who had not completed his purchase, for the purpose of having the testimony of the witnesses to the will perpetuated, and praying also that the heir might show cause why the will should not be established against him, and that the purchase might be completed by the parties interested under the will conveying to him, the court dismissed the bill *in toto*, but without prejudice to the perpetuation of the testimony; and afterwards, upon the matter coming on, upon the petition of the purchaser, before Lord Hardwicke, in respect of the costs which he had incurred in those proceedings, Lord Hardwicke gave the purchaser his costs, so far as related to the examination of the witnesses, in order to the perpetuation of the testimony, and also the costs which the purchaser had paid to the heir at law. Now, that case was very much relied upon on the part of the appellant, because the bill, which sought to establish the will, was dismissed against the heir. But it is to be observed that the bill was filed by a purchaser under a decree, who had not completed his purchase; and, according to the old rules of this court, a purchaser was entitled to require the will to be proved against the heir; but he never had, so far as I am aware, any right to have the will estab-

lished; and it is evident that the decision proceeded upon this ground, for the Master of the Rolls dismissed the bill, without prejudice to perpetuating the testimony; and Lord Hardwicke gave the costs of perpetuating it; clearly, therefore, showing that the case proceeded on the ground of the right of such a purchaser to file a bill to perpetuate testimony, but as having no right to file a bill to establish a will against the heir.

The next case was *Devonshire v. Newenham*; there the bill was filed by parties claiming to be beneficially interested under the will of a testator who had been tenant in tail, and suffered a recovery; and the bill prayed to have the rights of the parties declared, and the trusts of the will carried into execution; and a tenant in tail in remainder, who would have been entitled if the recovery was bad, was made a defendant to the bill. The court held that the bill could not be maintained against him, the title being paramount; but it is remarkable that Lord Redesdale, in his judgment, distinguished that case from the case of a bill against the heir at law, against whom, however, the bill in that case would in any event have been maintained, because there were trusts to be executed. *Lord Fingall v. Blake*, the next case upon which the appellant relied, is more important, and is certainly entitled to considerable weight, as indicating the opinion of a judge, who, from his long experience, was intimately acquainted with the practice of the court. Sir Anthony Hart said in that case, where there was a trust to be executed the issue was to be directed, but where there was no trust the court had no ground to interfere to direct the mode of trial, but only had to take care that a fair trial should be had, by putting outstanding terms aside; from which it would seem to follow, that if there was no outstanding term, no relief could be given by the court. But much of the weight which is justly due to this authority is removed by the circumstance, that in the case in which this opinion was pronounced there was in fact a trust, and the opinion, therefore, was entirely extrajudicial. It does not appear, indeed, that the point was at all argued, and the opinion pronounced upon it does not seem to me to be reconcilable with what was done by Lord Hardwicke in *Berney v. Eyre*. No great reliance, therefore, I think, can be placed on the dictum in *Lord Fingall v. Blake*.

And as to the remaining case of *Strickland v. Strickland*, I think still less weight can be attached to it, for I do not perceive by the report that Sir George Strickland in that case claimed in the character of heir; and if he had, I am confident, from my own recollection of the case, that the point insisted on by the appellant in this case was not then brought under the consideration of the court. The only other authority relied upon by the appellant which I think it material to notice was the passage cited from Lord Redesdale's treatise, to which the Lord Chancellor has adverted; but that passage, as I understand it, is rather against than in favor of the appellant, for Lord Redesdale does not say that the jurisdiction over the heir is founded upon the right to have the title quieted against his demand, which, indeed, would be directly contrary to what he

decided in the case of *Devonshire v. Newenham*, because the heir's title is just as paramount as the title of the tenant in tail was paramount in that case; but Lord Redesdale assumes the existence of the jurisdiction, and says that where the disposition is for sale or charge, confining his observations to those cases, the court requires the jurisdiction to be exercised. The authorities cited on the part of the appellant do not, therefore, appear to me to bear out the position, that it is only in cases where there are trusts to be executed that this court exercises the jurisdiction of establishing the will against the heir.

On the other hand, there are cases referred to in the learned Vice-Chancellor's judgment which show that the jurisdiction has been more extensively exercised, and that judges of the highest authority have spoken of it in terms importing that it is of general application. It would be a mere waste of time to go through the authorities cited by the Vice-Chancellor. It is sufficient to say, that, as I read them, they embrace the decisions of Lord Hardwicke, and of Lord Manners, the dicta of Lord Eldon, and the decisions of my learned brother and of the late Sir J. Parker, independently of the case before Lord Cottenham, on which, perhaps, it would not be safe to rely, as his observations may possibly have had reference to the trusts which existed in that case. These decisions and dicta, as it seems to me, far outweigh the authorities cited on the part of the appellant.

Much has been said in the progress of this case upon the origin of this jurisdiction; but it is of little importance how the jurisdiction originated, if it be found to exist. In this respect, I entirely agree in the opinion of Mr. Fonblanque, in his *Treatise on Equity*. He there says: "To establish the origin of any branch of legal or equitable jurisdiction is always difficult, and seldom necessary, provided the exercise of such jurisdiction be conducive to ends of substantial justice;" and that the exercise by this court of such a jurisdiction in such a case as the present is conducive to the ends of justice, I feel no doubt whatever. The Vice-Chancellor has probably traced the jurisdiction to its true source, but other sources are not wanting from which also it may have originated. The Lord Chancellor has already referred to what had also struck my mind — the course of the ecclesiastical courts in this country, of entertaining suits for probate in solemn form, establishing wills against the next of kin; and I think it by no means improbable that the ecclesiastics who, in early times, held the office of chancellor, may have introduced their practice into this court, and applied it to real estate. Again: in early times, when the custom of devising prevailed in cities and boroughs, it seems to have been the usual course, where the title of the devisee was disputed, to issue a writ *ex gravi querela*, commanding the officer of the city or borough to admit the will to proof, and to do right to the devisees. There are several instances of such writs in Fitzherbert; and it is by no means improbable, when the power of devising became general, that the court assumed the jurisdiction, which before had been locally exercised. I am also

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very much disposed to think that this court formerly interfered, in case of apprehended future claims, to a much greater extent than it has done in modern times. The case of *Baker v. Shelbourne* is an instance of the court having done so. The origin of the jurisdiction, however, is more an object of curious research, than of importance to the decision of the present case. Upon the whole, the conclusion to which I have arrived is, that this court has jurisdiction to establish a will against an heir at law at the suit of the legal devisee, although there may be no trusts to be executed under the will. The other part of the case, as to the effect of the proceedings in Ireland, was but very faintly urged on the part of the appellant, and I do not think it necessary to do more than to say that the bill, in my opinion, is not open to demurrer on that ground. I think, therefore, that the appeal in this case must be dismissed.

*Appeal dismissed, with costs.*<sup>1</sup>

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WING v. HARVEY.<sup>2</sup>

April 20, 1854.

*Policy of Insurance — Local Agent, Authority of — Forfeiture, Waiver of.*

Indorsed upon a life policy was a condition that the policy should be void, and the money secured thereby be forfeited to the use of the Insurance company, if the insured should go beyond the limits of Europe without the license of the directors. The condition was infringed by the insured going to reside in Canada, where he died; but, after the breach, the local agent of the company at the place where the policy had been effected continued to receive the usual premiums upon the policy, with notice of the breach of the condition, which he represented as not invalidating the policy, provided the premiums were regularly paid: —

*Held*, that the Notice of the breach of condition given to the agent of the Insurance office was constructive notice thereof to the company; and that the latter, whether they had express notice of the breach or not, were precluded by the conduct of their agent from insisting upon the forfeiture upon the death of the insured.

THIS was a claim, filed by Mr. Abraham Wing, for payment by the Norwich Union Life Insurance Office of moneys insured, under two policies granted by them in 1829 and 1830, upon the life of William Bennett, of Rougham, near Bury St. Edmunds, of whom Wing was a creditor. The defendant was one of the directors of the insurance society, by one or more of whom the society were enabled by their act of parliament to be sued, and the payment sought was resisted on the ground that the policies, upon which the moneys were secured,

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<sup>1</sup> An appeal to the House of Lords from this decision is now pending.

<sup>2</sup> Before the Lords Justices the Right Hon. Sir JAMES L. KNIGHT BRUCE and the Right Hon. Sir G. J. TURNER.

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were subject to a condition of forfeiture in case of the insured going, without the license of the directors of the society, beyond the limits of Europe, and that this condition had been infringed by the insured going, in 1835, to Canada, and continuing to reside there till his death, in 1849, without such license. The facts were the following: By an indenture, dated the 26th March, 1829, Bennett, in consideration of 300*l.* advanced to him by Wing, the plaintiff, granted to the latter an annuity of 50*l.* a year for his (Bennett's) own life, the grant containing a covenant by Bennett that he would do all acts and give all information and vouchers necessary to enable Wing, if he should be so advised, to insure any sums on the life of Bennett; and in that event, that he (Bennett) would not do any act to avoid the policy or policies which should be so effected by Wing; and that, in case he should leave the United Kingdom, he would himself make good to Wing any extra payment in respect of premiums upon the said policies, which the latter might on that account be called upon to make. By way of collateral security for the advance, Bennett gave his bond and warrant of attorney to enter up judgment for the amount. Shortly afterwards Bennett, at the instance of his creditor, Wing, effected an insurance at the "Norwich Union Society for the Insurance of Lives and Survivorships," upon his own life for 300*l.*, there being indorsed upon the policy, among other conditions, one to the effect, that "if the party, upon whose life the insurance is granted, shall go beyond the limits of Europe without the license of the directors, this policy shall become void, the insurance intended to be hereby effected shall cease, and the money paid to the society become forfeited to its use." This policy was by deed-poll, dated the 29th October, 1829, assigned by Bennett to Wing, by whom notice of the assignment was given to Edward Lockwood, the general agent of the insurance office for transacting their business at Bury St. Edmunds, and through whom the policy assigned had been effected. On the 1st May, 1830, a grant of another annuity of 33*l.* 6*s.* 8*d.*, containing the same covenants, was executed by Bennett to Wing to secure a further advance of 200*l.*, made by the latter to him, the repayment of which was also collaterally secured by the bond and warrant of attorney of the grantor, and by a policy of insurance to that amount upon his life effected by him, at the instance of Wing, at the said Norwich Union Insurance Office, through Lockwood, as their agent at Bury St. Edmunds, and which policy Bennett assigned to Wing on the 25th May, 1830, Wing shortly afterwards giving notice of such assignment to Lockwood. After the insurances were effected and assigned to him, Wing himself, or through his brother, (a solicitor of Bury St. Edmunds,) regularly paid the premiums of 6*l.* 6*s.* and 4*l.* 5*s.* 6*d.*, annually payable thereon respectively, to Lockwood, by whom they were received, and transmitted to his principals at Norwich. In June, 1835, Bennett infringed the condition indorsed upon the policies by going to Canada, where he thenceforth continued to reside till his death, in July, 1849. Upon Lockwood applying for the premiums upon the policies, which became due after the departure of the insured to Canada, Wing made him aware of that fact, and asked, on each occasion, whether it would be

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safe to pay the premiums under the circumstances. Lockwood replied that the policies would be perfectly good, provided the premiums were regularly paid, and Wing thereupon paid the usual amount of premiums to Lockwood, who received them, and transmitted them regularly to the head office of the society at Norwich. After the death of Lockwood, in 1847, John Thompson, who was appointed by the society to succeed him as their agent at Bury St. Edmunds, continued to receive and transmit to his principals the premiums paid by Wing, although the same communications were made to him, on his applying for them, as had been made to Lockwood. It appeared also, that in 1842 and 1847, bonuses were appropriated to each policy by the society, and certificates of such bonuses sent by them to Wing through their agent at Bury St. Edmunds. It was further shown, in evidence, that in 1842, upon the death, in Canada, of a Mr. Younge, whose life had been insured in England, at the Norwich Union Office, his will, attested by one William Bennett, of Rougham, together with the probate thereof, was sent to the head office of the insurance society at Norwich, for the purpose of furnishing evidence of the death of Mr. Younge; and that subsequently, in 1848, the representatives of Younge wrote a letter to the secretary of the insurance society at Norwich, in which the writer mentioned, incidentally, that the only person he knew in Canada, from Bury St. Edmunds or its vicinity, was a Mr. Bennett, of Rougham. Upon the death of Bennett, Wing, his creditor, claimed the sum for which his life had been insured by the policies above mentioned, together with the bonuses which had been appropriated thereto, but the society refused to pay it, alleging, as a ground for their refusal, that, in consequence of Bennett's departure to and residence in Canada, the policies had become void, and the moneys secured thereby forfeited, in conformity to the condition indorsed upon the policies. They offered, however, to repay to Wing the amount of the premiums paid upon the policies since the period when the policies became forfeited in 1835, with compound interest thereon at 4l. per cent. The present claim was then filed by Wing, claiming the full amount of the sums insured, and the bonuses thereon; or, in the alternative, should he not be held entitled to the sums insured, to repayment of all the premiums which had been paid from the beginning of the policies, with interest at 5l. per cent. The claim was, by permission of the court, set down for hearing at the same time as an appeal motion for production of documents by the insurance company, without having been previously heard by an inferior branch of the court.

*Glasse, Q. C., and Fooks, for the plaintiff.* It is contended on the part of the society represented by the defendant, that though the agents of the society at Bury St. Edmunds had notice of the breach of the condition indorsed upon the policies at the times at which they received the premiums which became due subsequently to such breach, yet the directors of the society had no such notice, inasmuch as the fact was not communicated to them by their agents. It is submitted, however, that inasmuch as Lockwood and Thompson were

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the general agents of the company for the purpose of negotiating their insurance business at Bury St. Edmunds, notice to the agent is constructive notice to the principal. Paley on Principal and Agent, 252. They were the agents of the company, and the only persons through whom policies could be effected with the society at their branch office at Bury St. Edmunds. Payments and receipts made there in respect of the policies granted by the society, and of the premiums payable thereon, all necessarily passed through their hands; and through them it was that notices of assignments, and other matters affecting policies granted by the society at Bury St. Edmunds, were given to the society. Being agents of so general a character, they must be considered as the agents also through whom representations were to be made to the society; and Wing was entitled to assume that the society would be informed of all that was communicated to their agent. The presumption, moreover, is, that the agents did give them such notice; and it is submitted also that the letters of 1842 and 1848 amount to express notice to the society of the breach of the condition indorsed on the policies. In addition to this, it appears that it was the habit of the office not to insist upon the forfeiture, but to accept compensation in respect thereof, in the shape of an extra premium for the increased risk to the life insured; and that in the case of departure to and residence in the United States, or the British settlements in North America, even this was not insisted upon. This appears to have been the case with regard to many policies granted upon lives by the society prior in point of date to those granted to Bennett, but all of the same form, and having the same indorsement as those had. Wing, therefore, had no reason to believe that the payment of any additional premium was required to prevent the forfeiture, nor was any opportunity afforded him of avoiding the consequences of forfeiture, as other persons holding policies had. He is, however, willing and offers to make up the extra premiums payable since 1835; and it is submitted that on doing so he will be entitled to the full amount insured, and the bonuses. If not, he is at all events entitled, under the circumstances, to a return of all the premiums which have been paid upon the policies since they were effected, together with interest thereon. [They cited *Sanders v. Pope*, 12 Ves. 282; *Ex parte Hennessy*, 1 Con. & L. 559; and *Gale v. Lewis*, 9 Q. B. 730.]

*Malins, Q. C., and Rogers*, for the defendant. There is no doubt that by the terms of the condition indorsed on them the policies were forfeited in 1835. The only question is as to the extent of the authority of Lockwood and Thompson, as agents of the society — whether such authority extended to a power to waive the forfeiture, and that without even insisting on the payment of an increased premium. It is submitted that it did not. They were the local agents of the society at Bury St. Edmunds, and their duty was confined to receiving proposals for effecting insurances with the society, communicating those proposals to the society at their office at Norwich, who, if they intended to act upon them, prepared and sent the policies to their agents, who delivered them to the insured, and received and transmitted to

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Norwich the premiums received upon them. For those purposes only were they the agents of the society, and to those objects only did their authority extend. For any thing beyond this they had no right of independent action, and could not legally bind the society unless expressly authorized by them. *Accey v. Fernie*, 7 M. & W. 151. That being so, it is submitted that they were acting *ultra vires* in making a new contract, and setting the policies again on foot on terms different from those usually sanctioned by the office, and that there could be no constructive notice of such new contract to the office implied. The evidence of express notice being transmitted to the society is insufficient. There is nothing to identify the William Bennett mentioned in the letters of 1842 and 1848 with the party insured.

[KNIGHT BRUCE, L. J. The party pays and the agent receives the premiums upon the faith and condition that the policies are to be considered as valid and subsisting; and the argument is, that, though the money was paid under those express conditions, the person paying it is to be in the same position as if he had paid it unconditionally. How can he be now reinstated in his position? If he had been informed, in 1835, that the forfeiture would be insisted on, he might have insured the life at another office. Not so now, the life having dropped.]

That is the fault of Wing himself for not having himself communicated the real state of the case to the office at Norwich. The evidence shows that whenever either he or his brother paid the premiums, it was with a doubt whether the policy continued valid; and the covenants taken from Bennett in the deeds granting the annuities, show that he was aware that an increased premium would probably be required on the party insured going out of Europe. The society, though it sometimes waives the forfeiture in that event, and receives compensation by an increased premium, has never done so after the life insured has dropped.

*Glasse, Q. C.*, was not called upon in reply.

KNIGHT BRUCE, L. J. If the directors, represented by the defendant, had themselves personally received the premiums which Mr. Lockwood and Mr. Thompson received, with the same knowledge as they had, that would certainly have been a waiver of the forfeiture, and the defence would have been ineffectual; but they were their agents for the purpose of receiving the premiums upon subsisting policies — premiums paid to them upon the faith of the policies continuing valid and effectual, notwithstanding the departure and residence at Canada of the person whose life was insured — a faith in which Lockwood, and afterwards Thompson, knowingly acquiesced and expressly sanctioned. Those premiums having been, from time to time, transmitted to the directors, and retained by them without objection, I think, whether Lockwood or Thompson informed or did not inform them in fact of the true state of circumstances in which the premiums were paid to them, the directors became, and are, as between themselves and the plaintiff, as much bound as if those pre-

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miums had been paid by the plaintiff directly to themselves, they knowing at the time, on each occasion, the place of Bennett's residence. The directors, taking the money, were or are precluded from saying they received it otherwise than for the purpose and on the faith for which, and on which Mr. Wing expressly paid it. If, however, it were important for any purpose of the suit to determine whether it ought to be inferred that the directors received from Lockwood or Thompson, or from both, some at least of the premiums with actual, direct, and personal notice of Bennett's place of residence, I should hold, upon the materials before us, that an affirmative answer should be returned to that. It is unnecessary to refer to the case of *The Duke of Beaufort v. Neeld*, 9 Jur. 813; 12 Cl. & Fin. 248, as decided by the House of Lords in 1845; though, perhaps, the principle on which that decision proceeded, is not inapplicable to the present controversy.

TURNER, L. J. In this case Lockwood, and afterwards his successor Thompson, were, beyond all doubt, the agents of the insurance office to receive the premiums payable upon the policies, and they did receive those premiums upon the policies during the whole period between 1835, when Mr. Bennett went to Canada, and 1849, when he died. They received those payments with a knowledge that they were made by Mr. Wing, upon the faith of the policies in respect of which they were made being subsisting policies, and valid notwithstanding the absence of Mr. Bennett beyond the limits of Europe; and the society, or the directors thereof, received those premiums from their agents, without objection. It was said, however, that the office so received them without having notice of Bennett's residence beyond the prescribed limits. Whether that was so it is unnecessary to determine; but I fully concur in the observation of my learned brother upon that subject—that if we were driven, upon the affidavits before us, to conclude upon the fact, whether the insurance office was affected with notice of the circumstances under which the premiums in question were paid, and of the absence of Bennett beyond the boundaries limited by the policies, the conclusion to which we must arrive upon the affidavits, framed as they are, would be, that the office was affected with notice of the facts. I think it, however, immaterial to determine that question. The office, undoubtedly, received the money from their agents, to whom it had been paid upon express terms and conditions. I think, therefore, that as Lockwood and Thompson were the duly constituted agents of the office for the purpose of receiving the premiums, it was the duty of Lockwood and Thompson, and not that of the plaintiff, to communicate to the head office at Norwich the circumstances under which those premiums had been paid to and received by them; that the office having held out Lockwood and Thompson as their agents, to whom the public at Bury were to resort, it was incumbent upon Lockwood and Thompson, and not upon the parties applying to them, to communicate to the office the representations annually made on the receipt of the premiums upon policies. Upon these grounds, I must

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*Ex parte Russell; In re Minnitt.*

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consider these policies as continuing and subsisting policies, and that therefore this claim must be allowed.

*Malins, Q. C.*, said, that as the court had decided in the plaintiff's favor on the main question at issue, the insurance office would not insist on the payment of extra premiums in respect of the period of the residence in Canada of the insured, but would pay the sums insured by the policies, with interest at 4l. per cent.

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*Ex parte RUSSELL; In re MINNITT, a Bankrupt.*<sup>1</sup>

April 28, 1854.

*Bankrupt-law Consolidation Act, 1849—Construction of 160th Section—Official Assignee not to be remunerated for preparing Balance-sheet and Accounts.*

The official assignee of the bankrupt's estate is not a person to whom an allowance can be made, under the 160th section of the Bankrupt-law Consolidation Act, 1849, out of the estate and effects of the bankrupt, for assisting him to prepare his balance-sheet and accounts.

A rule laid down by a district commissioner that the balance-sheet should be made out on every occasion of bankruptcy by the official assignee:—

*Held*, by Sir G. J. Turner, L. J., to be contrary to the intention of the 160th section of the act, that section requiring rather that the commissioner should, in each particular bankruptcy, exercise a discretion, under the circumstances, whether to employ a person to assist the bankrupt or not.

This was an appeal by the creditor's assignee of a bankrupt, under an adjudication in the Birmingham district, against the allowance of 20 guineas made by the commissioner to the official assignee, for preparing the bankrupt's balance-sheet. It appeared that a general rule had been laid down by the commissioner in the Leeds district, and acted on there, and also in part of the Birmingham district, by which the bankrupt's balance-sheet was uniformly prepared by the official assignee, and an allowance made to him for so doing, this allowance being in addition to that made to him under the Bankrupt-law Consolidation Act, 1849, for the subsequent examination of the balance-sheet. The object of the present appeal was to bring the question of the validity of the rule before the court for decision, the question depending upon the construction of the 160th section of the Bankrupt-law Consolidation Act, 1849, which enacts as follows: "That the bankrupt shall prepare such balance-sheet and accounts, and in such form as the court shall direct, and shall subscribe such balance-sheet

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<sup>1</sup> Before the Lords Justices the Right Hon. Sir JAMES L. KNIGHT BRUCE and the Right Hon. Sir G. J. TURNER.

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*Ex parte Russell; In re Minnitt.*

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and accounts, and file the same in court, and deliver a copy thereof to the official assignee ten days at least before the day appointed for the last examination, or the adjournment day thereof for that purpose; and such balance-sheet and accounts, before such last examination, may be amended from time to time as occasion shall require and such court shall direct; and the bankrupt shall make oath of the truth of such balance-sheet and accounts, whenever he shall be duly required by the court so to do; and the last examination of the bankrupt shall in no case be passed unless his balance-sheet shall have been duly filed as aforesaid; and the court may, on the application of the assignees or of the bankrupt, make such allowance out of the estate of the bankrupt for the preparation of such balance-sheet and accounts, and to such person, as the court shall think fit, in any case in which it shall be made to appear to the satisfaction of the court, from the nature of the accounts or other good cause, that the bankrupt required assistance in that behalf."

*James, Q. C., and Hardy*, for the creditors' assignee, submitted that the rule adopted by the commissioner was contrary to the spirit and intention of the act of parliament, and against public policy, and was one which the commissioner had no authority to make, and, so far as the official assignee was concerned, was in direct contravention of the rule which forbade him to carry on any trade or business.

*Bacon, Q. C., and Prior*, for the official assignee, submitted that the rule in question was a wholesome one; that it saved great expense to bankrupts' estates, which would otherwise fall into the hands of accountants. They further argued that it violated no principle of public policy, and that, under the circumstances, there was nothing irregular in the same person preparing and examining the balance-sheet.

**KNIGHT BRUCE, L. J.** There can be no doubt that this is a difficult and perplexing act of parliament, and it cannot be matter of surprise that different opinions should be entertained as to different parts of it. The 160th section has never before been under my consideration; and the question which I am now called upon to decide is, whether the official assignee is a person who can become entitled to an allowance under it. It is said that he is, by reason of the generality of the words "to such person as the court shall think fit." I am of opinion that it is contrary to the spirit and policy of the act to say that the official assignee is a person within the meaning of these words. I am of opinion, that according to a safe, wholesome, and legitimate interpretation, this section does not authorize the official assignee to charge for the preparation of the balance-sheet; and as the commissioner has proceeded solely and merely on this section, I hold that the allowance of 21*l.* cannot be sustained, but must be struck out of the account. This result has nothing to do with any view on my part as to the services rendered by the official assignee, but rests solely on

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*Ex parte Russell; In re Minnitt.*

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the ground that the allowance was based upon a construction of the statute which I cannot put upon it.

TURNER, L. J. I desire it to be understood that, in disposing of this case, I do not proceed on any particular facts, nor on any suggestion of undue favor to the bankrupt, or of injury caused to his estate, but simply and solely on the question of principle. The 160th section of this act has provided that the court may make such an allowance, and to such person as the court shall think fit, in any case in which it shall be made to appear to the satisfaction of the court that the bankrupt required assistance. The question is this — whether it is or can be a sound exercise of discretion on the part of the commissioner, and one consistent with the provisions of the section, to make an allowance to the official assignee for preparing the balance-sheet and accounts, the fact being that the official assignee has been employed in that way. This is to be determined by considering what are the duties of the official assignee. The bankrupt, by the terms of the act, is to prepare his balance-sheet, and deliver a copy to the official assignee within ten days before his last examination. For what purpose has the legislature provided that this shall be done, but for the purpose that the official assignee may check and control the accounts made out by the bankrupt? This is his duty, and he is put in possession of the books of the bankrupt so that he may be able to perform this duty. If, then, it is his duty to check the bankrupt's accounts, what principle must we apply to the case? There are two or three cases which occur to me as illustrating the principle by which the court is guided. Take the practice of courts of equity in relation to the employment of a receiver. It was a settled rule that no master could be appointed receiver — upon this principle, that it was the master's duty to check the accounts; and this rule was acted upon, even though it might well be that the master would not have to check his own accounts. In like manner, in the case of a lunatic's estate, the court has always set its face against the committee being appointed receiver, because it is part of his duty as committee to check the receiver's accounts. A case still more nearly resembling the present was that in which a bankrupt was chosen to be creditor's assignee of his own estate. This happened in the case of Mr. Boldero, in whom his creditors placed so much confidence that they chose him to be assignee; but the court displaced him, on the ground that his duty as assignee was inconsistent with his obligations as a bankrupt. So, in the present case, I take it that the duty of examining the balance-sheet is inconsistent with the duty of preparing it. It has been said that the consequence of our decision will be to deliver estates into the hands of accountants, and to increase the expenses of bankruptcy. But I have too much confidence in the commissioners, to think that they will not take care to prevent such a consequence. They may differ from us in opinion, but I am sure this difference will not prevent them from using their sound discretion in making allowances out of the bankrupt's funds for the preparation of the balance-sheet. It was argued that no evil could arise from the

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rule laid down by the commissioner; but if the account be not satisfactory, it is the duty of the commissioner to send it back to the official assignee for correction; and I cannot think that a person can reconsider an account which he has prepared himself, without some bias. There is another matter to which it is right to advert, namely, that the rule laid down by the commissioner is not in conformity with the provisions of the act of parliament. He ought, as I construe the act, to exercise his judgment in each particular case separately; and a general rule, that the account may be made out by the official assignee, is in violation of that. Such a rule is dangerous, and interferes with the discretion of the commissioner. The appeal must be allowed; the costs of all parties to be paid out of the estate.

HINDSON v. WETHERILL.<sup>1</sup>

May 29 and 30, 1854.

*Solicitor and Client — Solicitor may take a Benefit under his Client's Will prepared by the Solicitor himself — Evidence — Oral Examination of Parties as Witnesses on Appeal.*

Where a testator makes a disposition by his will in favor of the solicitor employed by him to make the will, in such language and under such circumstances as that upon the trial at law of an issue *devisavit vel non*, brought by the heir at law of the testator, or upon the hearing by the Ecclesiastical Court of a suit touching the validity of the will, the disposition in question would be upheld, this court will not, on the mere ground that the relation of solicitor and client existed between the solicitor and the testator, interfere, at the instance of the heir at law or next of kin, to fix a trust for the benefit of either of them upon the property devised or bequeathed to the solicitor.

Where, upon the hearing of a cause by a Vice-Chancellor, a tender by the defendant of himself to be examined orally as a witness for himself in the cause, with a view to his cross examination by the plaintiff, had been refused by the plaintiff, this was

*Held*, by the Court of Appeal to be a sufficient ground for refusing to accede to an application by the plaintiff to have that course adopted upon the hearing of an appeal from the Vice-Chancellor's decree.

THIS was an appeal from the decision of Sir J. Stuart, V. C., (reported 18 Jur. 233; s. c. 23 Eng. Rep. 132,) whereby he refused to give effect to a disposition made by a testator in favor of the solicitor, who had prepared his will. The facts of the case and the arguments of counsel will be found fully set forth in the report above referred to. The cases of *Nelthorpe v. Holgate*, 1 Coll. 221; *Raworth v. Marriott*, 1 My. & K. 643; *Ingram v. Wyatt*, 1 Hagg. 394; *Paine v. Hall*, 18 Ves. 475; and *Balch v. Symes*, Turn. & R. 87, were cited, in addition to those referred to in the court below.

<sup>1</sup> Before the Lords Justices the Right Hon. Sir JAMES L. KNIGHT BRUCE and the Right Hon. Sir G. J. TURNER.

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*Daniel, Q. C., and Renshaw* were heard in support of the plaintiff's case, the appeal being from the whole decree.

*Malins, Q. C., and Fischer,* were not called upon for *Wetherill*, the appellant.

*Kirkman* appeared for the co-executor; and

*Oliver*, for certain legatees who did not appeal.

Knight Bruce, L. J. We have had an opportunity of considering this case out of court since the argument was broken off yesterday, and we are now able to dispose of it. The question, whether in the matter of this testator's will, the conduct of Mr. Wetherill was prudent, was delicate, or was such as should be recommended to other solicitors for exact imitation, is not within our cognizance, and does not require decision. The question to be resolved is, whether upon the assumption, which must be made, that the will and codicil were duly, properly, and on sufficient grounds admitted, as they were, to probate, and upon the assumption also, that, upon an issue *devisavit vel non*, if it were directed, the heir would have no case as to the entire will and codicil, or as to any part of either instrument, Mr. Wetherill ought, upon the facts in evidence, to be deprived in equity of all beneficial title to the real estate, and the note of 1,000*l.*, or either of them. How the matter would have stood if undue influence, if misrepresentation, or if surprise, or any unfair dealing had been established against him, or if it had been shown that he had omitted to perform any duty which was incumbent on him as the testator's solicitor or agent, it is unnecessary for me to say, for, in my opinion, no such thing has been done. Mr. Wetherill prepared his client's will, containing a disposition in his own favor. There begins and there ends the case, as I view it. But, the case so beginning and so ending does not take away the right, either legal or equitable, of the solicitor to be for his own benefit a devisee or legatee. It is, in my opinion, not shown that this testator made his will under any mistake or misapprehension, or, if he did so, that the mistake or misapprehension was one of which the existence or the continuance was caused or induced by, or is ascribable to the solicitor, or was one to the existence or continuance of which the solicitor contributed. It appears to me that, upon the evidence, the testator must be taken to have made his will as a free agent in every sense, not only as the term is understood in courts of law, but as it is understood in courts of equity also. He meant to do what he did, and there is, I think, a total absence of evidence to show that his intention in that respect was unfairly caused, unduly procured, or improperly induced.

It has been argued, but in my opinion not proved, that the testator gave instructions for his will, and made it, without a knowledge or without a recollection of Mrs. Hindson's letter to him, and that, therefore, Mr. Wetherill ought, before the will was signed by the testator, to have mentioned the letter to him. It appears to me that the evi-

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dence before us is perfectly consistent with the notion that the testator had received the letter in due course, had read it as soon as it was received, and had instructed Mr. Wetherill to answer it as it was answered, and gave the instructions for the will, in their original as well as in their final state, with a perfect recollection of both letters. Nor do I perceive any ground for inferring that Mr. Easton's<sup>1</sup> assistance (if any) or interference in the claim, which had been the subject of the compromised action of ejectment, was not contemporaneously known to the testator, or had been forgotten by him. The testator's feelings towards his relations, or some of them, may very possibly not have been those of a moral philosopher or an accomplished Christian; but I see no reason for believing that he had received from any of his family any service or benefit whatever, or at least any deserving of gratitude on the testator's part.

As to the authorities cited, they seem to me all consistent with the conclusion in Mr. Wetherill's favor, it being impossible that a testamentary gift by a client to a solicitor can, as against the latter, be liable to all the same considerations as a gift to him *inter vivos* would have been, though it may be open to some of them; and with regard, in the present instance, to the gift of the note, whether it would have been maintained independently of the will, I do not say or suggest. However that may be, I think, that circumstanced as this case is, the will cured the infirmity (if any) in that transaction, and was effectual with regard to the real estate; as to which, however, if the plaintiff shall desire an issue *devisavit vel non*, he ought, I suppose, to have it. I should, perhaps, notice the application made to us by the plaintiff's counsel, for an oral examination of Wetherill as a witness for himself, in order to his cross-examination by the plaintiff before us. Whether we should have acceded to that application if Wetherill had not tendered himself for that purpose before the Vice-Chancellor, it is unnecessary to say, for he did so, and that course must be taken to have been opposed on the part of the plaintiff. This seems to us a sufficient reason for not acceding to it now. Possibly upon an issue, if there shall be one, he will be called.

TURNER, L. J. With great deference to the opinion of the Vice-Chancellor, and with quite as strong a desire as he can feel to check transactions of this description, by which solicitors acquire property from their clients, I certainly cannot venture to go the length to which he has gone by this decree. The facts of this case do not seem to me to raise any question of law, because, according to the evidence which has been read from the answer of this gentleman, the whole case, alleged by the bill, seems to be entirely and effectually disposed of. I do not desire, therefore, to be considered, on the present occasion, as giving an opinion in favor of the right of a party to file a bill of this description in this court; nor do I intend to say, that under

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<sup>1</sup> Mr. Easton was stated to have acted as the agent of Mr. Wetherill at York in the matter of the action of ejectment.

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no circumstances could such a bill be maintained. But it is to be observed that this is the first instance within my experience, or, I believe, within my research, in which an attempt has been made to fix a trust upon a disposition made by will on purely equitable grounds—I mean those peculiar equitable grounds which apply as between solicitor and client, and guardian and ward. Indeed, I really have been in some alarm at the consequences of the doctrine being introduced into this court, of fixing trusts, upon such a ground, upon testamentary dispositions; because it is obvious that if this be done in the case of solicitor and client, it must equally be done in that of guardian and ward; and in every case where a ward, from motives of gratitude or affection, has made a disposition in favor of his guardian soon after the ward has attained twenty-one, it will be the duty of this court to fix a trust upon the guardian, and to hold that the guardian is a trustee for the heir at law and next of kin of the testator of all the property which may have been disposed of in favor of the guardian by the will of the ward.

Now, it is obvious that there is a great distinction between the jurisdiction of this court as applied to cases of contract, and the jurisdiction of this court as applied to cases of testaments. In cases of contract, this court has jurisdiction to order the instrument, upon which the contract is founded, to be delivered up to be cancelled; but this court has no jurisdiction to order a will to be delivered up to be cancelled, whether it relates to real estate, or whether it relates to personal estate. When a case comes into this court upon probate, a court of competent jurisdiction has determined that the disposition made by the testator, is according to the will and intention of the testator; and I take it, that if any fraud that would affect the will and intention of the testator, can be proved in the Ecclesiastical Court, that court can rectify the instrument, and take out of the will the particular clause in which the disposition affected by the fraud has been made; and so I take it for granted, that in a court of law, if there be a question of fraud upon the will, that fraud may be set right, whether it applies to the whole will or to part of it, provided the interests are such as can be dealt with in a court of law. Cases may arise, and have arisen, in which questions on the validity of particular dispositions, made by will, have been such as that they could not be properly got at by a court of law; and this court has in those cases interfered for the purpose of directing a trial at law of the particular question which arose, assuming the general disposition to be effectual. Now, the only case which at first sight appeared really to have any bearing upon the question before us, was the case of *Segrave v. Kirwan*, 1 Beat. 157. Some doubts have, I rather think, been at different times suggested upon that case. I rather think I have heard that case in some degree questioned; but it seems to me that that case is clearly distinguishable from any thing which at all approaches to the present case; because in *Segrave v. Kirwan*, there was no intention of the testator appearing at all. The testator had appointed a counsel in that case to be his executor, not knowing that the effect of the appointment of the counsel as executor vested in him

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and gave him the beneficial ownership of the property otherwise undisposed of; and, therefore, there was no intention of the testator at all intervening in that case of *Segrave v. Kirwan*; and the decree in that case of *Segrave v. Kirwan* was not a decree which declared the party to be a trustee to whom the testator had given the beneficial interest, or had intended to give the beneficial interest, because the testator was in total ignorance that the disposition which he had made by his will, had the effect of giving the beneficial interest at all. It appears to me, therefore, without meaning to give any opinion absolutely concluding questions similar to that on this part of the case — it appears to me that there must be extreme difficulty in making out a case which would entitle this court to interfere, and so to declare a trust upon a beneficial interest vested in another party on such a ground as this, where the question depends, as here, entirely upon the intention of the testator. I concur, therefore, with my learned brother in the opinion, that the bill, so far as it relates to this part of the suit, must be dismissed.

*Malins*, Q. C., and *Fischer*, for the appellant on the one side, and *Daniel*, Q. C., and *Renshaw*, for the plaintiff on the other, were then heard on the subject of costs.

KNIGHT BRUCE, L. J. For obvious reasons it has happened, and must happen often, if not generally, that when a gift from a client to a solicitor is questioned in a court of equity, the solicitor, though succeeding in establishing it, does not obtain the costs of the investigation. I do not say that that is a general rule; it may or may not be so. For the present purpose I will assume it to be so. Here, however, the circumstances are special and peculiar. The proceedings in the ecclesiastical court, of which, by the way, all parties had their costs out of the estate, must have been sufficient to afford the present plaintiff full knowledge of the true circumstances of the case, so far as they were material. It is probable, that even had the opposition in the ecclesiastical court not taken place — even had the evidence which was adduced there not been adduced — it would of necessity have been taken, that, having the local assistance he had, he must be considered to have had the means of knowing every thing which it was material for him to know previously to the institution of this suit. In these circumstances, and within less than three weeks from the termination of the proceedings in the ecclesiastical court, after the costs of it had been given, this bill was filed, not accurately stating the facts of the case, charging drunkenness against the testator — a charge which was wholly irrelevant or impertinent, or introduced for the purpose of weakening the case of Wetherill, by reason of his own conduct, or with reference to his own conduct. It charges Wetherill, in terms, with having acted unfairly, and it imputes insolvency to him. But in a case where, even if the supposed merits had been with the plaintiff, the jurisdiction to investigate them in this court was questionable at least, although I do not mean to pronounce any conclusive opinion upon it — in a case also where those merits,

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as it appears to me, are clearly proved against him, and in my opinion had come to his knowledge before the suit was instituted, I think we should not be warranted in declining to dismiss the bill, with costs, as against all the defendants, so far as it claims, against the defendant Mr. Wetherill, the note for 1,000*l.* and the real estate. The decree, in other respects, is a matter of course.

TURNER, L. J. It is unnecessary for me to add any thing upon this question of costs.

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PARKER v. SOWERBY.<sup>1</sup>

June 14, 1854.

*Will — Dower — Election.*

A testator, by his will, gave his personal estate and an annuity to his wife, and devised his real estate to trustees, with power to "let" and cut timber: —

*Held*, affirming the decision of the court below, that the widow was put to her election between the bequests and dower.

All that is necessary in these cases to raise a case of election is, that there should appear upon the face of the will an intention which would be frustrated by the claim of dower; and *Hall v. Hill*, 1 Dru. & W. 94, decided that such an intention was shown by the testator giving trustees a leasing power over his real estates.

THIS was an appeal from a decision of Sir R. T. Kindersley, V. C., (reported 17 Jur. 752; s. c. 21 Eng. Rep. 39,) where his Honor held — following Lord St. Leonards's decisions in *Hall v. Hill*, 1 Dru. & W. 94, and *O'Hara v. Chaine*, 1 Jo. & Lat. 662, and subsequent cases — that under a will bequeathing personal estate and an annuity to the testator's widow, and devising a freehold estate to trustees, accompanied with a power to let, the widow was put to her election as to dower. The facts are sufficiently stated in the previous report, except that by the will of the testator, John Monkhouse, there was given to the trustees a power of cutting timber upon any part of the freehold premises, and a power of doing repairs as well as the power to let. The appeal was, no doubt, presented in consequence of the observations of Sir J. Stuart, V. C., upon the case of *Hall v. Hill*, in the case of *Warbuton v. Warbuton*, 18 Jur. 415; s. c. 23 Eng. Rep. 415.

*Swanston* and *Bagshawe*, jun., for the appeal.

*Swanston*. The Vice-Chancellor considered that he was bound by decision; but said, that were the question *res integra*, he would

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<sup>1</sup> Before the Lord Chancellor, (LORD CRANWORTH,) and the Lords Justices.

differ from many of the authorities. Now the power of leasing here is of the simplest form, and no more than what would have been incidental to a devise of a fee-simple; and I submit, that a devise of a legal estate in fee would not put the widow to her election, yet it is quite clear that such a devisee would have a power of leasing, which would be subject to the right to dower. Upon what principle, then, can giving the trustees a power to let, put the widow to her election? The key to the whole question is, what has the testator devised? Nothing but what was his own; he has not expressed any intention to devise the dower. The last clause in the will, where he declares that if his wife should have a child by him after his decease the will was to have no effect, shows what he intended to devise, namely, that which, if he should have a child, would go to it as heir — that is, the estate subject to dower. Sir E. Sugden, in *Hall v. Hill*, 1 Dru. & W. 94, did not decide the question of election upon the mere circumstance of the leasing power, but upon all the circumstances of the case taken together; he, to use his own expression, *spell out* the intention of the testator from every part of the will.

[KNIGHT BRUCE, L. J. Is it a reasonable inference from that decision to say, that, if the power of leasing had not existed there, the widow would have been put to her election?]

LORD CHANCELLOR. What other circumstances existed in *Hall v. Hill*, which could have put the widow to her election?]

I submit that there were many other circumstances, which, though each by itself would not have put her to her election, still, when taken together, were sufficient to show an intention that the widow was not to have her dower.

[He then went very fully into that case, and read Sir E. Sugden's judgment, and referred also to *O'Hara v. Chaine*, 1 Jo. & Lat. 662; where Sir E. Sugden stated that he continued of the same opinion as that which he expressed in *Hall v. Hill*.]

I submit, therefore, that, taking Sir E. Sugden as his own expositor, the fair inference is, that he would not have considered that the leasing power alone would have been sufficient to put the widow to her election. *Warbulton v. Warbulton*, 18 Jur. 415; s. c. 23 Eng. Rep. 415. But if the court be against me on that point, then I say, that though the Vice-Chancellor might feel himself bound to follow those decisions, still, this court is not so bound.

[He then went very fully into all the earlier authorities on the point, citing *Lawrence v. Lawrence*, 1 Swanst. 398, note; *Strahan v. Sutton*, 3 Ves. 250; *Lemon v. Lemon*, 8 Vin. Ab. 366; *Hitchin v. Hitchin*, 1 Pre. Ch. 133; *Pitts v. Snowden*, 1 Bro. C. C. 292, note; *Arnold v. Kempstead*, 2 Eden, 426; Amb. 236; *Pearson v. Pearson*, 1 Bro. C. C. 291; *Villa Real v. Galway*, in note to preceding case; *Jones v. Collier*, Amb. 730; *Foster v. Cook*, 3 Bro. C. C. 347; *French v. Davies*, 2 Ves. jun. 572; *Greatorex v. Cary*, 6 V. 615; *Birmingham v. Kirwan*, 2 Sch. & L. 444; *Chalmers v. Storil*, 2 V. & B. 222; *Dickson v. Robinson*, Jac. 503; *Roberts v. Smith* 1 Sim. & S. 513; *Miall v. Brain*, 4 Mad. 119; *Bulcher v. Kemp*, 5 Mad. 61; *Dowson v. Bell*, 1 Kee. 761; *Harrison v. Harrison*, Id. 765; *Roadley v. Dixon*,

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3 Russ. 192; *Ellis v. Lewis*, 3 Hare, 310; *Lowes v. Lowes*, 5 Hare, 501; *Taylor v. Taylor*, 1 Y. & C. C. C. 727; *Holdich v. Holdich*, 2 Y. & C. C. C. 18; *Grayson v. Deakin*, 3 De G. & S. 298; *Gibson v. Gibson*, 1 Dru. 42; *Lord Ranchliffe v. Parkyns*, 6 Dow, 149; *Blake v. Bunbury*, 1 Ves. jun. 514; and *Lord Dorchester v. The Earl of Effingham*, Sir G. Coop. 319; and contended that it was contrary to sound principle to say that a widow is to be put to her election, from certain dispositions in the will, not showing that the right of the widow to dower was at all present to the mind of the testator, and in the absence of any express declaration of intention, or reference to the right of dower.]

*Glasse and Murray*, in support of the decree of the Vice-Chancellor.

[KNIGHT BRUCE, L. J. The only question is, has the testator shown, upon the face of the will, an intention that would be frustrated by the widow's claim to dower?]

*Murray* referred to the clause in the will enabling the trustees to cut timber.

[KNIGHT BRUCE, L. J. I was considering that point, but then a dowress cannot cut timber; however, the trustees could not enter upon her dower part, contrary to her desire.]

*Willcock and Bovill*, for parties in the same interest.

*Swanston* replied.

LORD CHANCELLOR, (LORD CRANWORTH.) I have no doubt whatever upon this case. I do not think that Mr. Swanston correctly states the rule of law upon this subject, when he says that, to raise a case of election against the wife, it must be apparent upon the face of the will that the testator had present to his mind the right of his wife to dower, and showed an intention that she should not have it. It must be apparent upon the will that his intention is to dispose of his property in a manner which is inconsistent with the right to dower. The two cases of *Hall v. Hill* and *O'Hara v. Chaine*, before Lord St. Leonards, when in Ireland, followed, as they have been, by two or three other cases in this country, appear to me to have laid hold of a distinction extremely reasonable. Supposing even all the cases that have been decided against the election right, still, I think this distinction a very intelligible one—I mean the existence of the power to lease given to the trustees, which, as Lord St. Leonards said, must mean a power to lease the whole; it cannot mean a power to lease that part which might not be given by metes and bounds to the widow. If it were necessary to find any additional reason for holding that this is a case for election, it would be afforded by the circumstance which was pointed out by Mr. Murray—I mean the express power to the trustees to cut timber upon any part of the estate; this would be wholly inconsistent with the right to

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dower. It appears to me that the case is quite clear; that the observations of Lord St. Leonards, when in Ireland, followed by Sir J. L. Knight Bruce, L. J., when Vice-Chancellor, by Sir J. Wigram, V. C., and by Sir R. T. Kindersley, V. C., in *Gibson v. Gibson*, show that the power of leasing is a distinction of importance, and one which may be acted upon; and I think that it would be very injurious to raise any doubt upon the law.

KNIGHT BRUCE, L. J. Mr. Swanston has afforded, as he always does afford, the court every assistance, and we are much indebted to him; but I acknowledge that even he has not been able to raise in my mind any doubt upon the point in controversy. The question really is, whether the court is bound by authority to read this will in a different manner from that in which it would be read by any person not a lawyer.

TURNER, L. J. I entirely concur in the conclusion to which the Lord Chancellor and my learned brother have come. It is said that the authorities have left this point in much doubt. Of course, that must be in an uncertain state which depends upon the intention to be collected from each separate will; but I have never, from the first, felt any doubt upon this will. The only question is, whether the testator meant to pass merely his interest in the estate, or the entire estate. That is to be collected from the contents of the will. Now, the testator has given to his trustees a power of leasing. How could that power have been exercised if the estate was subject to dower? It is quite clear that the fact of the power of leasing is wholly inconsistent with the fact that the widow was entitled to dower. Then it has been said that there is nothing to show that the testator knew that his widow would be entitled to dower out of his estate; but surely, every person must be taken to know what his own interest is in the property he devises. But there is another provision in the will which is not unimportant, namely, that the trustees were to have the management of the estate, and to direct such repairs as they should consider necessary. How could they enter upon the property to do the repairs if the right to dower existed?

*Appeal dismissed, with costs.*

*In re THE GERMAN MINING COMPANY, and in re THE JOINT-STOCK COMPANIES WINDING-UP ACTS.<sup>1</sup>*

May 11, 25, and 26, and June 13, 1854.

*Unincorporated Joint-Stock Company — Advances by Directors beyond Capital prescribed by Deed of Settlement — When allowed in winding up.*

By the deed of settlement of an unincorporated mining company, the capital of the company was to be 50,000*l.*, and it was provided that the affairs and business of the company should be under the entire control of the directors. The deed empowered the directors, if they thought it desirable, to create new shares by vote at a special general meeting. New shares were accordingly created, but the capital arising from these, as well as the original 50,000*l.*, having been exhausted, certain of the directors, and a shareholder, not a director, joined in borrowing money for the company from the bankers of the company, giving, however, at the same time, their personal guarantee to the bank for repayment; and the sum, &c., borrowed was then applied by the directors in payment of debts and expenses necessarily incurred in properly working the mines. After an order had been obtained to wind up the affairs of the company under the winding-up acts, the bank took in a claim for the sums so lent before the master, by whom it was allowed; but on appeal to the court the claim was directed to stand over, giving liberty to the bank to bring their action for their alleged debt, if any should be due to them from the company. The bank then brought their action accordingly, in which they were unsuccessful, the court of law being of opinion that the loan by the bank to the directors for the company could not be treated as a charge upon the company, but only as a personal loan to the directors and shareholder who had borrowed it; and thereupon the master's order, allowing the claim of the bank, was discharged. The bank then obtained payment of the sums advanced from the directors and shareholder upon whose guarantee they had been advanced, who then claimed to be allowed the moneys so recovered from them by the bank, before the master, as advances made by them to the company:—

*Held*, upon appeal from the Vice-Chancellor's decision, refusing to discharge the master's certificate allowing the claim, that inasmuch as the directors were *quasi* trustees of the company, and the evidence showed that the advances in question had been employed by them for the purpose of enabling them duly to discharge their trust, they were entitled to the indemnity usually extended to trustees in such cases, and to be repaid their advances, notwithstanding there was no power of borrowing or advancing money for the use of the company given to them by the deed of settlement.

THIS was an appeal from the decision of Sir John Stuart, V. C., refusing to discharge the certificate of Master Tinney, to whom the winding up of the German Mining Company's affairs had been referred, whereby he had certified that the respondents, all of whom were shareholders, and all except one directors, of the company, were entitled to be credited respectively, in their accounts with the company, with certain sums which they, as directors and shareholders of the company, had joined in borrowing of the London and Westminster Bank, the company's bankers, giving, however, at the same time, according to the custom of bankers in such matters, their personal guarantee or undertaking, for repayment, and which sums so borrowed by them had been expended in payment of debts and expenses necessarily contracted and incurred in the ordinary course of carry-

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<sup>1</sup> Before the Lords Justices the Right Hon. Sir JAMES L. KNIGHT BRUCE and the Right Hon. Sir G. J. TURNER.

ing on the mines. The facts of the case were as follows: The German Mining Company was established in this country in 1836, by English shareholders, for the purpose of working certain quicksilver and other mines, acquired and to be acquired in Prussia and Bavaria. The company was an ordinary company, not incorporated under the Joint-stock Companies Act or otherwise, but simply regulated by a deed of settlement of the usual kind. By that deed, which was dated the 2d May, 1836, the amount of original capital was fixed at 50,000*l.*, to be raised in 100 shares of 500*l.* each, to be paid by instalments of 50*l.* each; and it was, *inter alia*, provided by clause 3, that "the affairs of the company shall be under the sole and entire control of the directors, of whom there shall not be less than five nor more than nine, and that any three shall be competent to act." By clause 10, that "the directors shall have power to make such calls upon the shareholders, to the extent of 500*l.* per share, as they think necessary, each call not to exceed 50*l.* per share, and that one month's notice of such call shall be given to each shareholder." By clause 30, that "the company may be dissolved by two special general meetings, to be called for that purpose; provided that, for the purpose of voting and declaring a dissolution of the company, at least three fourths of the whole number of shares shall be represented at such several special general meetings, and shareholders representing such three fourths of the whole number of 100 shares shall be present, either in person or by proxy, and shall actually vote in favor of such dissolution; and provided that no ballot be demanded and granted." By clause 33, that "in case it shall appear to the directors to be desirable to sell and dispose of any of the mines and property of the company, or to subdivide the shares therein, or to create new shares, or to subdivide the present shares, or to make any alteration in the constitution of the company, or to propose any new rules, powers, or conditions for carrying on the same, or to rescind, alter, or make any additions to the clauses, powers, and provisions herein contained, or any other matter or thing which may not be, or appear to be, within the scope and intent and meaning of these presents, it shall be lawful for the directors to call a special general meeting of the shareholders, in manner aforesaid, for the purpose of taking such matter and subject into consideration, and adopting or rejecting the same; and that such matter shall be disposed of, adopted, or rejected at such special meeting, or by the result of a ballot taken in pursuance thereof, as if the same had been a matter or subject hereby expressly made cognizable and determinable by a special general meeting or ballot." The deed did not expressly authorize the directors or company to borrow money, but it contained a provision forbidding the directors to mortgage the mines and property of the company without the sanction of a meeting of the shareholders, to be called as therein mentioned. In pursuance of the provisions of the deed, several mines were set in work, and agents were sent to Germany, and employed in the conduct and management of the mines. The original capital of 50,000*l.*, proposed to be raised upon the original shares, was paid up and expended, and more

funds being required to carry on the undertaking, recourse was had by the directors, four several times, to the shareholders, to obtain their sanction for the creation of new shares, and such shares were accordingly created on four several occasions, by resolutions adopted at special general meetings of the shareholders, called, respectively, according to the terms of the deed, on the 29th April, 1841, the 12th April, 1842, the 3d July, 1843, and the 10th March, 1846. This method of raising funds for paying the expenses of working the mines having been exhausted, and the receipts from the new and original shares having been expended, the company's affairs became embarrassed, and it was resolved, at a special meeting of the shareholders, held on the 27th July, 1846, that the directors and trustees of the company be authorized and directed to sell and dispose of the whole or any part of the mines and property of the company, as they might deem proper.

The affairs of the company having become still further embarrassed, and the directors and trustees not having effected any sale of the mines and property, a printed report was made by the directors of the company in August, 1848, to the proprietors of the company, by which printed report the shareholders were informed that they, the directors, had hitherto delayed making any peremptory application for further payment, on two grounds: first, because the directors had been in expectation of selling the mines, and had some well-grounded hopes that from the produce of such sale, and of the minerals already raised, they might have obtained a sum sufficient to have discharged the whole of the liabilities of the company, without requiring the shareholders to make any further contributions; and, secondly, because the bankers of the company and other parties, from whom loans had been obtained, had not pressed for the payment of their debts, which in the last preceding annual report were stated at the sum of 14,086*l.* 14*s.* 9*d.*, and which, with subsequent interest to the 30th June, then last, amounted to 14,596*l.* 15*s.* 2*d.* That owing to the disturbed state of Europe, the directors had been defeated in their endeavors to effect a sale of the property, and could not express any strong hopes that they might meet with a purchaser until some great improvement had taken place in the affairs on the continent; and that the bankers had then insisted on the immediate liquidation of the large portion of the debts owing to them, and that the directors had no alternative but to call upon the proprietors to contribute, in proportion to their several interests in the concern, an amount sufficient to meet the liabilities of the company. This report concluded by proposing a plan for raising the money necessary to liquidate the liabilities of the concern, by means of a contribution from the shareholders, to be paid by instalments at considerable intervals, so as to give the directors a chance of effecting a sale of the mines in the mean time, and so as to avoid, if possible, all legal proceedings whatsoever by the creditors of the company against any individual proprietor of shares therein, each of whom, they (the directors) felt it their duty to observe, by that their report, was individually liable to such proceedings. This report was read and adopted at a special meeting of shareholders

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*In re The German Mining Co.*

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held on the 14th August, 1848, but at which only the directors of the company attended; but a copy thereof was afterwards sent to every one of the shareholders of the company, accompanied by a letter from the secretary, requiring payment of the first instalment, (proposed by the report,) on the 4th October, 1848. Five only of the shareholders having responded to the letter and report so sent to them, by paying the instalment required, the workings of the mines were shortly afterwards discontinued, except so far as it was necessary to keep them up for the purpose of retaining legal possession of the property; and early in 1849 an order was obtained under the Joint-stock Companies Winding-up Act, for winding up the affairs of the company. Under this order, the London and Westminster Bank brought in their claim before the master for the sum of 12,217*l.* 5*s.*, which they sought to establish as a debt against the company, being the amount of advances, with arrears of interest thereon, made by the banking company to the directors of the mining company on three several occasions, namely, an advance of 3,692*l.* 19*s.* on the 23d August, 1843; an advance of 1,200*l.* on the 18th January, 1846; and a third advance of 4,200*l.* in January, 1847. It appeared in evidence before the master that on each of these occasions the bank had taken the personal guarantee of some of the directors and shareholders of the mining company, three of such guaranteeing directors being also directors of the banking company. It appeared also that on the occasion of these loans, or advances being made, or negotiated no meeting of the shareholders of the mining company was called to authorize the transactions, but that at general meetings of the shareholders, not, however, specially convened for considering these special matters, but being the ordinary general meetings of the company, resolutions were passed adopting the accounts showing the borrowing of these special sums, and the expenditure thereof in the necessary expenses for carrying on the mines, and directing circulars to be sent, (which accordingly were sent to most, but not to all, the shareholders absent from the meetings,) stating the matters disposed of at such general meetings. Certain of the shareholders, including the present appellants, objected to the claim, which, however, the master allowed. The matter was then taken, by way of appeal, to Sir J. L. Knight Bruce, V. C., who ordered the application to stand over, giving liberty to the bank to bring an action at law for the debt due to them, if any debt was in fact due. See 14 Jur. 874. An action was accordingly brought, and a verdict was found partly favorable to the plaintiff (the bank) and partly favorable to the defendant, who was nominally one of the official managers of the German Mining Company, but substantially represented the class of contributories who, on behalf of the company, resisted the claim. The ultimate opinion, however, of the Court of Exchequer, delivered on making absolute a rule for a new trial, was, that the claim of the bank could not be maintained. See *Burmester v. Norris*, 6 Exch. 796; s. c. 8 Eng. Rep. 487. The court were of opinion that borrowing and lending money was no part of the habitual business of the company; that there was no power given by the deed to the directors to borrow the money; that from

the nature of the business there did not arise any implied power to borrow money; and that, consequently, the bank, lending to the directors for the company, lent to the directors personally, and could not charge the company as a company. After this opinion, the bank gave up the case as against the company, and in consequence an order was made by Sir James Parker, V. C., on the 16th April, 1852, on the application of the shareholders who, on behalf of the company, had throughout resisted the claim of the bank, to discharge the master's order. The claim of the bank was afterwards paid by the persons who had guaranteed its repayment, namely, the respondents in the present appeal, who, after the decision of this court made in May, 1853, (see 17 Jur. 745; s. c. 19 Eng. Rep. 591,) allowing a claim by directors and shareholders for advances to the company for liquidating debts, and liabilities of the company, to the payment of which every shareholder was liable, and which advances were expended in liquidating such debts and liabilities, applied before the master to be credited in their account with the company with the sums they had so paid upon their guarantees to the bank, as advances made for the payment of debts and expenses incurred by the company for the necessary purposes of the proper working and carrying on the mines. The master, considering the case to be governed by the decision of this court in May, 1853, allowed the claim; and Sir J. Stuart, V. C., upon being applied to by way of appeal from the master's decision, took the same view of the case, and refused to discharge the master's certificate.

*Malins, Q. C., Cowling*, (of the common-law bar,) and *Drewry*, in support of the appeal. It is submitted in this case, first, that however beneficially for the company the money advanced by the respondents was applied, they have no right to charge the company with it; and, secondly, that the money was not in fact applied for the benefit of the company so as to be a charge as against every shareholder within the meaning of your lordships' decision upon the directors' case in May, 1853. As to the first point, the decision in *Burmeister v. Norris*, taken in connection with that in *Morgan's case*, 1 Mac. & G. 225, is, we contend, a decision, not only that the directors have no power to borrow given to them by the deed of settlement, but also that they have no power under it indirectly to increase the capital to be furnished by the shareholders, by making advances out of their own pockets to pay the expenses of the mines. This undertaking is a joint-stock company, wherein each member is not liable, as in an ordinary partnership, for any amount of expense which may be incurred by his copartners in carrying on the joint concern, but liable only to the extent of liability defined by the deed of settlement. The peculiarity of a joint-stock company is, that the management of its affairs must necessarily be deputed to a few out of the whole body of copartners, chosen by the rest to be their agents, with powers defined and limited by the deed of settlement. This is the principal object of such deeds, and the courts have invariably held the directors strictly confined to the powers given them by their deeds.

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*Ricketts v. Bennett*, 4 C. B. 686; *Bramah v. Roberts*, 3 Bing. N. C. 963; *Fleming v. Hector*, 2 M. & W. 172; *Powles v. Page*, 3 C. B. 16; *Smith v. Goldsworthy*, 4 Q. B. 430; *Davis v. Hawkins*, 3 Mau. & S. 488; *Todd v. Emly*, 7 M. & W. 427; *Hautayne v. Bourne*, Id. 595; *Hawkin v. Bourne*, 8 M. & W. 703; *Tredwen v. Bourne*, 6 M. & W. 461; *Brown v. Byers*, 16 M. & W. 252; *The Bank of Australasia v. The Bank of Australia*, 12 Jur. 189. In the deed of this company, there is no express power given to the directors to borrow. If they have any such power it must be by implication; but here such implication is rendered impossible, inasmuch as the directors are quasi trustees, with trusts defined by the deed. By those trusts they are limited to a certain amount of capital, and it is submitted that it is part of their duty, as trustees, so to carry on the concern intrusted to them as not to exceed that capital, and, upon the capital being exhausted, either to stop further proceedings in carrying on the mines, or call upon all the shareholders to contribute a further amount of capital. The implication of a power to borrow is moreover excluded by the express provisions for raising capital contained in the deed. It is submitted, moreover, upon the second point, that the advances in question have not been laid out for the purpose of more advantageously winding up the company, as in the case decided by your lordships in May, 1853, but in abortive attempts to carry on the mines after the company had become hopelessly insolvent. Such an application of the fund cannot be held a charge upon every shareholder, and is not binding upon the company, unless, as is not the case here, the assent of every shareholder could be shown.

They cited, also, *Prendergast v. Turton*, 11 Law J. Rep. Chanc. 22, and *Norway v. Rowe*, 19 Ves. 143.

*Bethell*, S. G., and *Greene*, contra. There is here no fraud or collusion alleged against the respondents, and it is submitted that the nine propositions of fact considered by Sir J. L. Knight Bruce, L. J., as established in the case before the court in May, 1853, (see 17 Jur. 747; s. c. 19 Eng. Rep. 591,) are equally true in favor of the respondents in the present case. That being so, this is exactly the same case as that decided a year ago, for no supportable distinction can be taken between the case of money advanced by the directors for the purposes of the company out of their own pockets, as in the former case, and that of moneys borrowed by them upon their own personal credit, and then advanced to the company, as in the present case.

*Malins*, Q. C., in reply.

June 13. TURNER, L. J. The question for our consideration in this case is, whether several sums of money, paid by several of the contributories of the company under the circumstances which I shall presently state, ought to be allowed to them in account with the company. The master was of opinion that the allowances ought to be made, and certified accordingly; and Sir J. Stuart, V. C., refused to disturb the certificate. The case comes before us upon appeal

from the Vice-Chancellor's decision. The company was formed in the year 1836, under a deed dated the 2d May in that year. I shall have occasion hereafter to refer more particularly to some of the provisions of the deed; but it is sufficient at present to state that the objects of the company, as defined by the deed, were to work some mines in Germany which had already been acquired, and others the acquisition of which was contemplated, and to dispose of the ores and other produce of the mines; and that the deed provided that the capital of the company should consist of the sum of 50,000*l.*, divided into 100 shares, but that it contained provisions for the creation of new shares. It appears that the capital of the company was found to be insufficient to carry out its objects, and that further capital was raised by the creation of new shares under the provisions of the deed: that the further capital was also found to be insufficient, and that the company became indebted to its bankers: that on the 23d August, 1843, several of the directors and shareholders of the company joined in a guarantee to the bankers for 8,692*l.* 19*s.* then due to them, and for further advances to be made, and which were afterwards made by them, to an amount not exceeding in the whole 5,000*l.*; that on the 18th November, 1846, and the 6th January, 1847, further sums of 1,200*l.* and 4,200*l.* were borrowed of the bankers on the like guarantees of directors and shareholders; that the contributories whose cases are now under consideration, one of whom was a shareholder and the others directors of the company, joined in these guarantees; that the moneys thus borrowed of the bankers were expended in carrying on the business of the company in its ordinary course; that an order having been obtained to wind up the affairs of the company, the bankers claimed to be creditors of the company for the moneys advanced by them; that the question of the liability of the company to the bankers was referred to a court of law for its decision, and that it was decided at law that the company were not liable to the bankers; that under these circumstances these contributories have been called upon to pay, and have paid, the amount due to the bankers. It is the amount thus paid to the bankers which forms the subject of the present appeal.

The affairs of the company have already been under our consideration with reference to a question as to the right of the directors to be allowed some sums of money, which on that occasion, were understood to have been expended by them in carrying on the business of the company with a view to prevent loss in winding it up; and we were of opinion that the moneys so expended ought to be allowed. It was stated at the bar, on the argument of this appeal, that the whole or part of the sum now in question stands on the same footing as part of the sums which were formerly allowed; but I consider this of no importance, for if we were satisfied that our former judgment was erroneous, we certainly should not be disposed to persevere in the error. The question before us in this case was mainly argued, on the part of the appellants, on the ground, that, according to numerous decisions at law which were cited in the argument, the directors of companies are in the position of agents; that their powers

are derived from, and limited by, the deeds under which they are appointed; and acts done by them beyond the limits of their powers do not bind the companies of which they are directors; and it was insisted on the appellants' behalf, that it having been established at law that this company was not liable to the bankers for the moneys advanced by them, it followed, as a necessary consequence, that the respondents could not be entitled to be repaid by the company the moneys which they had paid in discharge of the amount due to the bankers. But although directors undoubtedly stand in the position of agents, and cannot bind their companies beyond the limits of their authority, they also stand in some degree in the position of trustees, and all trustees are entitled to be indemnified against expenses *bona fide* incurred by them in the due execution of their trust. There is no inconsistency in this double view of the position of directors; they are agents, and cannot bind their companies beyond their powers; they are trustees, and are entitled to be indemnified for expenses incurred by them within the limits of their trust. If, therefore, it appears that moneys advanced by the directors of companies have been duly applied for the purposes of the trust reposed in them, it can make no difference whether the moneys were originally advanced, or were in the first instance borrowed, and afterwards repaid by them. It may well be that they may be entitled to be repaid by their companies the moneys which they have advanced, although the persons from whom they have borrowed for the purpose of making the advance may not be entitled to recover against the companies. The question in the one case depends on the power of the directors; in the other, upon the rights incident to the character which they fill. What those rights may be must depend in each case upon the deed by which they are appointed; for no doubt a company's deed, or any other deed, may be so framed as to deprive directors or trustees of the right to indemnity; and if parties think proper to accept directorships or trusts under deeds so framed, they must abide by the consequences. But the right to indemnity is incident to the position of trustee; and if it is sought to exclude that right, the provision for that purpose must, as I apprehend, be clearly expressed. The question, therefore, which, in my view of the case we have to consider, is, whether the provisions of this company's deed exclude the right of the directors to be indemnified in respect of advances made by them.

It was argued, on the part of the appellants, that the right was excluded, because the capital of the company was limited to 50,000*l.*, and no call could be made beyond that amount, except in respect of further capital to be raised according to the provisions of the deed; from which circumstances this conclusion was deduced, that it was the duty of the directors so to conduct the concern as that a sufficient portion of capital should always remain in hand to meet the expenses. But, in the first place, it was impossible, from the nature of this concern, to foresee what expenses might be incurred, or what portion of the capital might be required to meet them; and, in the next place, the provisions of this deed demonstrate that the parties to it looked

to the produce of the mines as a fund to meet the expenses. The dividend clauses, distinguishing profits and produce, seem to me to be decisive on that point. The directors, therefore, could not be bound to conduct the concern upon the strict principles contended for by the appellants; and if they were entitled to look to the produce of the mines as a fund to meet the expenses, how were the expenses to be met if the produce was at any time insufficient for the purpose, and the directors were not at liberty, as between them and the shareholders, to make any advance? It was attempted to meet this view of the case by a reference to the 33d clause of the deed, under which it was insisted that in such a state of circumstances it was incumbent on the directors to have called a meeting of the shareholders; but I do not think it by any means clear, that the 33d clause of the deed applies to such a state of circumstances; it seems to me to refer rather to permanent than to temporary arrangements. But, assuming the clause to apply, I think it was in the discretion of the directors whether a meeting should be called; and if, in the *bona fide* exercise of their discretion, (and their *bona fides* is not questioned,) they considered that the advances made by them would establish the company on a sound footing, and that it was not for the interest of the company that a general meeting should be called with a view to any of the purposes mentioned in the 33d clause, I do not think it was incumbent on them to call such a meeting, or that their having neglected to do so can be made the ground either of charging them or of depriving them of any benefit to which they were entitled. Directors, acting *bona fide*, cannot, as I conceive, be charged for a mere error in judgment—at all events, when a discretion is reposed in them. It may further be observed, on this part of the case, that the shareholders, who were apprized by the report of moneys having been advanced by the bankers, might, if they thought fit to do so, have themselves called a meeting to dissolve the company.

It was strongly argued by the appellants' counsel, that whatever might be the right of the directors to indemnity against the property of the company, they could have no such right against the shareholders personally; that the liability of the shareholders was limited to their respective shares of the 50,000*l.* But I think that, where parties place others in the position of trustees for them, they are in equity personally bound to indemnify them against the consequences resulting from that position. I may refer to the case of *Balsh v. Hyham*, 2 P. Wms. 453, as a strong authority in support of that position. In the case of *Balsh v. Hyham*, it appears that the plaintiff was a trustee for the defendant of the sum of 1,000*l.* South Sea Stock, and, at his desire, borrowed of the company 4,000*l.* on a mortgage of the stock, and the defendant, the *cestui que trust*, received the money borrowed; and afterwards the act of parliament was made, which provided, that if any of the borrowers would pay to the company 10*l.* per cent. before such a day, they should be discharged of the rest of the money borrowed. The defendant, the *cestui que trust*, thought that he was entitled, notwithstanding that provision of the act, to leave the company to take the stock, and that he was not

liable to pay the 10% per cent. to the company in discharge of the lien; and he gave notice to the trustee not to pay the 10% per cent. The trustee, however, did pay the 10% per cent., and then he filed a bill against the *cestui que trust*, to compel him personally to repay, there being, of course, no trust funds in his hands to which he could resort for the repayment. The Lord Chancellor said this — although this money, be it observed, was paid expressly against the protest of the *cestui que trust*: “If the defendant had not only forbid the payment of this 10% per cent., but had also offered security to indemnify the trustee in respect of it, this had been material had the plaintiff afterwards paid the 10% per cent. But the plaintiff had good reason to think that he was liable to pay the whole money borrowed.” Then he goes on to say: “When money is borrowed, it ought to be paid,” and so on. “If a mortgagor borrows money, though there be no covenant in the mortgage deed to pay it, yet his executor has been decreed to pay the money in discharge of the land descended to the heir; but if in the present case there was only a hazard, the trustee ought not to continue liable to such hazard. On the contrary, as it is a rule that the *cestui que trust* ought to save the trustee harmless as to all damages relating to the trust, so, within the reason of that rule, where the plaintiff, the trustee, has honestly and fairly, without any possibility of being a gainer, laid down money by which the defendant, the *cestui que trust*, is discharged from being liable for the whole money lent, or from a plain and great hazard of being so, the plaintiff ought to be repaid. Therefore, let the defendant pay to the plaintiff the 10% per cent. paid by the plaintiff to the company, with interest and costs.” Now, that case, I think, is a full authority for the position, that a trustee is entitled to resort to his *cestui que trust* personally for an indemnity in respect of moneys applied by him in the due execution of his trust. With respect to what has been said as to the liability of the shareholders being limited to their shares of the 50,000%, I think that is a circumstance to be considered, as I have already considered it, with reference to the question whether the right of indemnity exists; and that, it being established that a right does exist, the law supplies the remedy. I have treated the case throughout as if all the respondents were directors; one, I observe, was a shareholder only, but I do not think this varies the case. My opinion, therefore, is, that this motion must be refused, with costs.

Knight Bruce, L. J. In May, 1853, when this court disposed of a controversy between the parties now before us, or some of them, that has been mentioned more than once during the argument on the present appeal, I represented myself as considering certain propositions of fact to be established and true. I stated them then particularly, and the counsel in this case being aware of them, their repetition is needless. I adhere to them, not merely with reference to the former contention, but with reference, also, to the whole subject of that now before us, and for the purpose of the present appeal. Supposing that thus far I am right, it must, I think, follow that the master has come to a correct conclusion on each occasion, now as well as

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before. The appellants' argument has been mainly or wholly based on the language of the deed constituting the German Mining Company, so far as it relates to the capital of the company and to calls; language, however, which — taken especially, as it must be, in connection with the rest of the deed — does not, I think, require or admit the appellants' construction, nor can, in my opinion, be properly attended by the consequences ascribed by them to it; and this not by any means the less because, as they desire us to understand the deed, it was one under which not any honest man of ordinary prudence would, I conceive, have submitted to be a director — one, as it seems to me, not reasonably consistent with the nature of the adventure, with the kind of business which the company was formed for carrying on. Dissenting from the appellants' exposition of the instrument, and their view of its consequences, I must hold that the present motion ought to be refused; and, considering what the Vice-Chancellor did as to costs before him, they ought, I think, to pay the costs here.

*Appeal dismissed, with costs.*

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HOLMAN v. LOYNES.<sup>1</sup>

December 14 and 15, 1853, and January 25, 1854.

*Attorney purchasing from Client — Attorney in hac re.*

An attorney cannot sustain his purchase from a client unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger.

An attorney may deal with a client as a stranger where the circumstances are not such as to put him under the duty of advising the client. — Per Turner, L. J.

The relation of attorney and client was in this case held to continue, although the attorney had not acted as such for the vendor for more than a year previous to the purchase, (but prepared the purchase agreement, and charged accordingly,) he having previously been employed as attorney about an attempted sale of the same property.

The sale from a client in this case was set aside, on the ground that the consideration, an annuity, ought to have been considerably greater, by reason of the intemperate habits of the vendor, although the vendor, acting under the advice of an auctioneer, named the price and pressed the attorney to purchase.

Observations on the true consideration not appearing upon the purchase deeds.

Observations upon the analogy between the rules as to gifts and sales from clients to their attorneys. — Per Turner, L. J.

This was an appeal from a decree of Sir John Stuart, V. C., setting aside certain sales of freehold and copyhold property. The bill was filed by the heir at law and customary heir of one Charles Hol-

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<sup>1</sup> Before the Lord Chancellor, (LORD CRANWORTH,) and Sir G. J. Turner, L. J.

man, deceased, stating the facts of the case relative to the sales by Charles Holman to the defendant, (which facts are fully stated by the Lord Chancellor in his judgment,) and insisting that previous to and at the time of the several purchases, the defendant, Loynes, had acted as the solicitor of the said Charles Holman; that the nominal considerations, as expressed upon the face of the several deeds of conveyance, were inadequate, the property comprised in the first conveyance being of the value of 800*l.*, and that comprised in the second conveyance being of the value of 350*l.*; and that the actual considerations given in the shape of annuities, namely, the annuity of 40*l.* in lieu of 340*l.*, and the annuity of 26*l.* in lieu of 208*l.*, were erroneously calculated, those equivalents being, according to the annuity tables, only calculated for ordinary average lives, whereas the bill charged that at the time of the first purchase, and up to his death, the said Charles Holman was of the most intemperate habits, which made the probable duration of his life less than the ordinary probable duration of a male life of his age; and it charged that the defendant, Loynes, was well aware of the value of the property, and of the intemperate habits of Charles Holman.

The defendant, Loynes, by his answer, stated that until the year 1836, he was not acquainted with the said Charles Holman, but that he was then employed by him in an action against one Henry Neville, in which Holman became indebted to him in the sum of 60*l.* for costs; that this sum being still due in January, 1838, at Holman's request he lent him a sum of 40*l.*, and took from him a promissory note for 100*l.* He then admitted his employment, in 1846, as the solicitor of Holman, in the matter of the sale or attempted sale of the property in question, one Edward Houghton acting as the auctioneer; that at that auction no sum was bid for lot 1, but that Holman would have willingly taken 100*l.* for it; that for lot 2 only the sum of 110*l.* was bid; that for lot 3 only 60*l.* was bid, and for lot 4 only 180*l.* was bid; that lot 5 was sold; that no offer was made for either of lots 6, 7, or 9; and that the sum of 80*l.* only was bid for lot 8. He then stated, that after the said sale by auction the said Charles Holman employed the said Edward Houghton as his agent to sell the said property by private contract, and he offered the same to several persons without being able to effect a sale thereof; and the said Charles Holman frequently applied to the defendant, and urged him to purchase the property comprised in the said lots 1, 2, 3, and 4, upon an annuity, which the defendant declined to do; but that in the month of July, 1848, the said Edward Houghton, with the said Charles Holman, called upon the defendant, and they then requested the defendant to purchase the said last-mentioned property; and after a long discussion, during which the defendant expressed his disinclination to purchase such property, he at length agreed so to do for the sum of 260*l.*, and an annuity of 40*l.* to be paid by the defendant, to the said Charles Holman, during his life, which annuity, according to the tables of the value of life annuities, was worth the sum of 340*l.*, making, with the said sum of 260*l.*, the sum of 600*l.* as the purchase-money for such property; the defendant at the

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same time saying, "that although he had agreed to purchase such property, yet, if the said Charles Holman could get an offer for it upon the same terms, elsewhere, he, the defendant, would readily give up the purchase." That a day or two after the said agreement had been entered into, the said Charles Holman informed the defendant that he, the said Charles Holman, had, previous to such agreement, verbally agreed with a Mr. Joseph Springall Southgate, to sell to him the said lots 1, 2, 3, and 4, in consideration of an annuity of 57*l.* to be paid to the said Charles Holman, during his life, (the value of which annuity would be 487*l.* 8*s.* 6*d.*.) and that if the defendant had not agreed to purchase such lots as he did, he, the said Charles Holman, intended to have sold the same to the said Joseph Springall Southgate, at his offer of an annuity of 57*l.* That in the years 1849 and 1850, the said Charles Holman, and the said Edward Houghton, as his agent, offered for sale to several persons, the remainder of the said property of the said Charles Holman, being the lots 6, 7, 8, and 9, at the said sale by auction, and they, on several occasions, applied to the defendant to purchase the same, which he, not wishing to have such property, declined to do; but, in the latter part of the year 1850, the defendant was again urged by the said Charles Holman and his said agent, to purchase such property at the sum of 200*l.*, the said Charles Holman at the same time saying he would much rather have an annuity of 26*l.* a year, during his life, than the money; and as the said Charles Holman said that he was unable to obtain a purchaser for such property, the defendant at length consented, and agreed to purchase the same in consideration of an annuity of 26*l.* to be paid to the said Charles Holman during his life, the value of such annuity being the sum of 208*l.* That he gave the full and utmost value for the properties so purchased by him as aforesaid, and, throughout the whole of the transactions of the said purchases by the defendant, the said Charles Holman was acting under the advice and with the assistance of the said Edward Houghton, who well knew the value of the said properties, and who was, as the defendant believed, perfectly satisfied that the defendant had given the full value for the same. He denied all knowledge of Charles Holman having been of intemperate habits, or that it was the fact. Evidence was given on the part of the plaintiff, that for many years before his death, Charles Holman had been much addicted to drinking, and other excesses, and was, in consequence, laboring under disease. From the books and bills of costs of the defendant, it appeared that he had for nearly a year after the attempted sale of the property by auction, in 1846, acted as the solicitor of Holman, in preparing abstracts of title relative to the then unsold lots. The evidence of Edward Houghton was produced on the part of the defendant, which showed that Houghton was not aware that Charles Holman had been of intemperate habits, and, which established the fact as stated by the defendant in his answer, that Charles Holman was acting under his, Houghton's, advice in selling the property to the defendant.

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*Daniel* and *Wickens*, for the plaintiff, contended that this was a clear case for applying the rule of equity against allowing a solicitor to purchase from a client, unless he complied with the terms laid down by Lord Eldon in *Gibson v. Jeyes*, 6 Ves. 266: submitting that the relation of solicitor and client in the present case had not been terminated, and that the consideration was clearly inadequate; citing also *Cutts v. Salmon*, 16 Jur. 623; s. c. 12 Eng. Rep. 316.

*Taylor* and *Spinks*, for the defendant, the appellant, contended that the relation of solicitor and client had terminated between Holman and the defendant before this purchase, and that the defendant could not be looked upon as the solicitor and adviser of Holman in *hac re*, it being proved by the evidence that Holman was, at the several times of these purchases, acting under the advice of Edward Houghton, who was proved to be a very experienced person; citing *Montesquieu v. Sandys*, 18 Ves. 302; *Wood v. Downes*, Id. 120; *Cane v. Lord Allen*, 2 Dow, 289; *Edwards v. Meyrick*, 2 Hare, 60; and *Austin v. Chambers*, 6 Cl. & Fin. 1.

*Wickens* replied.

*January 25.* LORD CHANCELLOR, (LORD CRANWORTH.) The bill in this case was filed by the heir at law of Charles Holman to set aside two sales made by him. The defendant, Loynes, was the attorney of Charles Holman. The first sale impeached took place in July, 1848; the second in December, 1850. There was an attempt to sell by auction in 1846 the whole of the property of Charles Holman in nine lots, but only one of the lots was sold—lot 5; and in July, 1848, about two years afterwards, there was a sale by Charles Holman to the defendant of lots 1, 2, 3, and 4, the consideration being 260*l.*, and an annuity of 40*l.* to Charles Holman for his life. In December, 1850, there was a second sale of the remaining lots 6, 7, 8, and 9, the consideration being an annuity of 26*l.* granted by the defendant to Charles Holman for his life. In February, 1852, Charles Holman died. In June, 1852, the present bill was filed by Charles Holman's heir, impeaching the sale on the ground of the relation in which the parties stood to each other, namely, that of attorney and client, and that the defendant did not duly protect his client's rights. The defence is—first, that the relation of attorney and client did not subsist; secondly, that if it did subsist, the conduct of the defendant was altogether proper. Now, supposing the relation of attorney and client to have subsisted, I take the rule of law to be perfectly clear that there is nothing absolutely preventing an attorney purchasing from his client; but then he takes upon himself very heavy responsibilities. He cannot sustain his purchase unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger, I quote the words of Lord Eldon in *Gibson v. Jeyes*, 6 Ves. 271. Again: a little further on in the same page that very learned judge says: "The court must hold, that if the attorney does mix himself

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with the character of vendee, he must show to demonstration — for that must not be left in doubt — that no industry he was bound to exert would have got a better bargain." The first point we have to decide is, whether the relation did subsist; and secondly, if it did, whether the defendant duly discharged its duties. The first question is one of fact. The burden of proof is upon the plaintiff, and I think he makes out the proposition for which he contends, namely, that the defendant was the attorney of Charles Holman within the meaning of the rule; and this appears mainly from the defendant's own books. It appears from those books that in 1836 the defendant acted as the plaintiff's attorney in an action against a person of the name of Neville, in respect of which Holman became indebted for costs to the extent of 60*l*. The defendant on that occasion lent Holman 40*l*., and took from him a note for 100*l*., at 5*l*. per cent., with a deposit of title-deeds. That closed that transaction. No further professional business occurred for seven years, and until September, 1843, when the defendant was engaged in preparing a lease from Holman to Mr. Ellis of some land in Wells.

The next transaction was the sale by auction in 1846, and that led to the considerable employment of the defendant by Holman. It appears from his books that the defendant was employed by Holman in the ordinary way in which a client employs a solicitor in the sale of an estate. There is an entry of the 17th April: "Holman, attending you this day respecting the sale of your estate at," &c. Then on the 20th: "Attending you again this day, and taking instructions," &c. Then there are several other similar entries in April and May; and for the 19th May there is this entry: "Attending you to fix a reserved bidding on the different lots." Then on the 20th: "Attending the auction," &c. It appears, therefore, that the defendant undoubtedly acted as the attorney for Holman in every way in which an attorney could act for a party who was about to sell, and did attempt to sell, his estate by auction. Only one lot was actually sold; and during the rest of that year, and up to the 19th March, 1847, the defendant was engaged in carrying into execution the sale of the only lot that was sold. But not to go through the various ways in which he acted as Holman's solicitor, I will state that he seems to have acted in every way in which it was possible as the solicitor of a vendor. After that sale had been completed, the defendant prepared an abstract of the remaining eight lots, which was prepared evidently in case any purchaser should offer. This went on until April, 1847. So the matter rested until July, 1848, when the defendant himself purchased. Now, it appears to me clear that the defendant was at that time the attorney of Holman in the matter of this sale. He had been put into a situation to communicate with any purchaser who might offer, and, in truth, he was the agent for the purpose of getting the estate sold. I do not mean to impute personal misconduct to Mr. Loynes, in the observations which I am about to make. The result was, that the defendant agreed to purchase from Holman, and that the defendant was his solicitor. If additional proof were necessary, it is clearly made out by an entry

in his own books of the 29th July, 1848: "Drawing purchase agreement for the sale of your premises at Wells, to Mr. Loynes," (that is, himself,) "and fair copy thereof." If a stranger had been the purchaser, it would have been, to all intents and purposes, the charge for acting as the solicitor of the vendor. The conclusion, therefore, to which I have come is, that he was in this transaction acting as the solicitor for the vendor.

Now, that being so, did he duly discharge his duty? Has he shown to demonstration, as Lord Eldon says — that is, for want of a better expression, to a moral certainty — that by no industry which he was bound to exert could he have got a better bargain? I think he has wholly failed in showing that. As to the first purchase, I will assume that 600*l.* would be a fair price for the property sold in July, 1848: the evidence tends to prove that it was; but there was no 600*l.* paid. The real question is, whether 340*l.* was a fair price for the annuity of 40*l.* a year. I think that it was not so. The value, according to the tables, appears to have been 340*l.*, assuming the life to have been a good average life. But, in fact, the life of the vendor was not a good average life. The evidence, not to go into detail, satisfies me that Holman was desperately addicted to drinking; that he was of gluttonous habits; that he was excessively indolent, and did not take proper exercise. The defendant either knew this, or might have known it by the smallest possible inquiry. The value of the life was calculated at ten or twelve years' purchase; in fact, he only lived three years and a half after the first transaction, and a year and a few months after the second. His death within that short period of time would not be material, if reasonable pains had been taken to ascertain what the probabilities of life were; but I cannot find that any steps were taken for that purpose. No examination was made to see if his life was insurable; if it had been made, I believe it would have turned out to be clearly an uninsurable life; and if the solicitor had known that, he might well have bargained with a third person for an annuity greatly beyond the tables. In the second purchase, in December, 1850, the consideration was an annuity of 26*l.* a year. Exactly the same observation applies. The consideration is stated to be 208*l.* The value of such an annuity in the tables is said to be 232*l.*; but it is quite obvious that it would be very much less, taking into account the state of health and the habits of this unfortunate man. Besides all this, the consideration is not correctly stated on the face of the deeds. In the first transaction the consideration is stated as a sum of 600*l.* actually paid. All that was actually paid was 50*l.* 210*l.* may fairly be stated as having been paid, because it was fairly due, and is not to be impeached in any respect; therefore 260*l.* may fairly be said to have been paid; but as to the remaining 340*l.*, there is no pretence for saying it was paid; and this might be of material importance, because 600*l.* appearing on the face of the instrument as the consideration, would give rise to no suspicion; but if the transaction was seen in its true light, grave suspicion might be excited. I do not place very much reliance upon this, because there was in the hands of the party a bond which

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stated what the real transaction was; still, in a transaction of this sort, it is essentially necessary, or at least very expedient, that the very truth should appear on the face of the instrument.

Now, the defendant relied on several cases as showing that the law, as laid down in *Gibson v. Jeyes*, is not applicable to this case; but no case, I think, bore him out in that proposition. The first case was *Montesquieu v. Sandys*, 18 Ves. 302. There the subject-matter of the sale was of a very peculiar description, namely, one fourth of a right of presentation to a living, the incumbent being a healthy life, and only forty-eight years of age. The right was in four coparceners, one of whom was to have the next presentation, and the purchaser was to have the next after that. As was truly argued in that case, such a property is of no marketable value, but purely speculation; therefore, though this right was bought by an attorney from his client, there was no pretence for saying that one party knew more than the other. The vendor offered it for 100*l*. Almost immediately after the transaction the incumbent was killed by a fall from his horse, and the next incumbent was an old life, so that the next presentation became very valuable. This was such a mere accident, and beyond the contemplation of the parties, that Lord Eldon thought it was a case in which the doctrine did not apply; that though the parties stood in the relation of attorney and client, yet every thing was known to each party; and as to this property, they stood at arm's length.

The next is the case of *Cane v. Lord Allen*, in the House of Lords. I do not see how any question could have been there raised. There the attorney had, by transactions of fifty years' standing, purchased a very considerable estate from his client, which purchase could not be impeached; but there was a little corner which he could not get possession of, because there was a life estate upon it. This after a time he agreed to purchase for 260*l*., so that it was a purchase of something like a reversionary property; so that if it was impeachable, it was more like impeaching it on the ground of its being the purchase of a reversion at an undervalue; but there was no evidence of undervalue. Both in Ireland and in the House of Lords it was considered as one transaction, and that the great transaction being unimpeachable, it must all stand or fall together. Then there was the case of *Edwards v. Meyrick*, 2 Hare, 60, before Sir J. Wigram. There again it would be straining the doctrine to a most inconvenient extent if it were held to apply to such a case as that; for the full value had been given for the estate, were it not that some short time afterwards, accidentally, unexpectedly, an act of parliament had passed for making a railroad. The result of that was, that the value of property in the neighborhood was very materially increased; for though it was known that there were collieries in the neighborhood, yet they were unworkable for want of the means of transport. By the fact of the railway coming close to the land, the property, which was of little or no value before, became of great value. That was a contingency that may happen to any person purchasing property. There was no doubt but that the purchase was perfectly honest and fair, according to what was then known to the parties, and Sir James Wigram held that that

accidental circumstance was not ground for impeaching the purchase. In the present case, I repeat, I think the real neglect of duty was the not endeavoring to get, as in all probability the defendant might have got, a considerably higher annuity, by reason of the intemperate habits of the vendor. On that ground, I think the decree below is right, and ought to be affirmed.

TURNER, L. J. These are purchases by an attorney from his client, the first partly in consideration of money paid and partly in consideration of an annuity of 40*l.*, and the second in consideration of an annuity of 26*l.*; and in estimating the value of the property, those annuities have been taken according to the table value. Now, I think it may fairly be stated upon the evidence in this case, and I am fully satisfied, that the life of the vendor was not, at the date of the transaction, an ordinary life. It is quite clear, as the Lord Chancellor stated, that the vendor had been addicted to excessive drinking, and his health had been impaired, and therefore that the annuities of 40*l.* and 26*l.* were not equal in value to the sums of 340*l.* and 208*l.*, at which they were estimated, and which were the values according to the tables calculated on ordinary lives. Now, it may be quite admitted, that if these transactions had taken place between Holman, the vendor, and any person not standing in a confidential relation towards him, they could not have been successfully impeached upon the ground of inadequacy of consideration, or upon any ground appearing upon the evidence in this cause: a mere stranger, having thus dealt with Holman, would have been entitled to retain to himself the benefits derived from these purchases. The question before us is, whether the defendant is so entitled; and this question appears to me to resolve itself into three points—first, whether, at the time when these transactions took place, the defendant is to be considered to have stood in a confidential relation towards Holman; secondly, what were the duties incumbent upon the defendant in consequence of that relationship, if it is to be considered to have subsisted; and, thirdly, whether those duties have been duly and properly discharged. As to the first point, it was urged, I must say, with very great force and very great ability upon the part of the defendant, that, when he made these purchases from Holman, he stood in no relation of confidence towards him, and was entitled to deal with him as any stranger might have done; that he was not, as it was said, attorney *in hac re*; and several authorities were referred to upon the question, in what cases an attorney dealing with a client was to be considered as not having been attorney *in hac re*, and was entitled to deal with the client as a stranger. The great importance of this question, as affecting transactions between attorney and client, has led me very carefully to examine those cases; and, upon examining them, I am satisfied that they fall very far short of what would be necessary to maintain in this case the position for which the defendant has contended. Lord Eldon, in *Montesquieu v. Sandys*, confines the cases within the very narrowest limits. The case he puts is that of an attorney purchasing what was not in any degree the object of his concern as at

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torney — the client making the proposal himself, proposing the price, no confidence asked or received in that article of price, and both parties equally ignorant of the value. Under those circumstances, he says the attorney is not the attorney *in hac re*; and, therefore, not being under any duty to advise his client against the act, (meaning, of course, the purchase by himself,) he may be the purchaser. Sir J. Wigram, in *Edwards v. Meyrick*, treats the expression, "attorney *in hac re*," as applied to that case, as one more of form than of substance; but he examines the principles of the court with respect to the dealings between attorney and client, and shows that the control, exercised by the court over such dealings, is part of its general system for preventing any undue advantage being taken by persons in whom confidence has been reposed. The case before him goes no further than that it was held, that a purchase by an attorney from a client could not be impeached upon the mere ground that a possible speculative advantage, which might have been known to the client as well as to the attorney, had not been made the subject of distinct communication by the attorney to the client. Sir J. Wigram, however, in that case, held that the *onus* rested on the defendant to show that the treaty was fairly conducted; and, in another part of his judgment, he refers to a circumstance which is not wanting in the present case — the disadvantage at which the client was placed from his being indebted to the attorney. Lord Abinger, again, in *Jones v. Thomas*, 2 Y. & C. 498, a case, the circumstances of which are so remote from the present that it is unnecessary to state them, deals with the expression, "attorney *in hac re*," and he treats it as referring to cases in which the transactions are entirely unconnected with the duty of the attorney. The cases, therefore, in which it has hitherto been held that an attorney may deal with the client as a stranger might do, are not cases in any degree resembling the present; they are not cases in which the attorney has been concerned in any previously contemplated sale, or in which any confidence as to the sale has been reposed in him, or in which the attorney has acquired, or has had the means of acquiring, any peculiar knowledge as to the property, the subject of the sale to him. The result of them, stated most favorably to the defendant, without reference to the important observations on the subject of influence made by Sir J. Wigram, in *Edwards v. Meyrick*, cannot be put higher than this — that an attorney may deal with a client as a stranger where the circumstances are not such as to put him under the duty of advising the client. This is the position with which Lord Eldon has summed up his observations upon the subject in *Montesquieu v. Sandys*; and this case may, I think, well be tried by that test.

It was not, of course, attempted to be denied that the defendant, while he was concerned in the sale by auction, and the business arising out of it, was under the duty of advising Holman; and the question, therefore, is one of determining a duty which has once attached, and not of imposing a duty which had not before existed. It was said that this duty of advising ceased when the sale by auction, in which the defendant was concerned, was at an end, or, at all

events, when the costs incident to the sale were settled; but the purpose of sale continued so far as Holman was concerned; as to him, the sales to the defendant were a continuance of the same business in which the defendant had been engaged; and I see no ground upon which the case can be put on one ground as to Holman, and on another as to the defendant. Again: it was said that the relation of attorney and client had wholly ceased; but it may be asked, when did it cease? If these transactions had taken place on the day after the business of the sale by auction was at an end, could it be said that the parties stood towards each other in any different relation from that in which they before stood? Could the defendant in such a case have been absolved from the duty of advising Holman? I think clearly not. Does, then, the lapse of time between the auction and the defendant's purchases alter the case? It does not appear to me that it does. No other solicitor had in the mean time been employed by Holman; and the true state of the case appears to me to be, that there was not any cessation of the relation, but only a cessation of the circumstances which were necessary to call the relation into action. I may add, upon this part of the case, and it is not, perhaps, unworthy of remark, that in these cases, where attorneys have been concerned in previous sales, there must, in some sense, be a continuation of the confidential relation between them and their clients. They must be bound, in any future dealings with the client as to the property which they have been employed to sell, to communicate any information respecting that property which they have obtained during their employment; and no attorney would, as I apprehend, be allowed to disclose such information to adverse parties. I agree with Sir J. Wigram, that the question of influence suggested by him, must also be considered in cases of this nature. The very ground of the rule which requires attorneys purchasing from their clients, and not advising them with reference to the purchase, to prove that the confidential relation has been determined, or the client put at arm's length, is the influence which naturally arises from the position of attorneys; and I much doubt whether the confidential relation can be said to be determined at all, whilst the influence derived from it can reasonably be supposed to remain. Gifts from clients to their attorneys can only be maintained when not only the relation has ceased, but the influence may rationally be supposed to have ceased also. That was laid down by Lord Eldon, in *Wood v. Downes*, 18 Ves. 120; and I see no reason why the rule, which applies to gifts, should not equally, in this respect, apply to purchases. It is true that the rules of the court against gifts are absolute, and that against purchases they are modified. But this is not a question upon the extent of the rules, but upon the circumstances under which they are to be brought into operation; and in that respect, I see no difference between the case of gifts and purchases. The defendant relied very much on Holman having been assisted by Houghton in the transactions of these purchases; but, however competent Houghton might be to judge of the value of the property, he was not the person to judge of the terms on which the value ought to have been converted

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into annuities; and, besides, if the defendant was under the obligation of advising Holman, he must also, I think, have been under the obligation of supervising Houghton. My opinion, therefore, upon this branch of the case is, that the defendant must be considered to have stood in a confidential relation to Holman when these transactions took place; and I am the better satisfied to have arrived at this conclusion, because I think that any extension of the powers of attorneys to deal with their clients, as strangers, would be dangerous in the highest degree, and would open a door to undue advantage being taken in cases in which it is now prevented by the rules of the court. Those rules require nothing more than that the client should be fully informed, and duly and honestly advised, and that the price should be just and fair; and this, I think, is not too much to be required of parties in whom confidence is reposed. Upon the other part of the case, I do not think it necessary to say more with reference to the duty which attached upon this defendant. The case of *Gibson v. Jeyes* appears to me to be conclusive with reference to the discharge of that duty. It seems to me that these annuities were not properly taken at the market value, and that the securities, given for the annuities, were not such securities as this gentleman would have been bound to advise Holman to have taken if the transaction had been a sale by Holman to a third person. I concur in the judgment which the Lord Chancellor expressed, and am of opinion that the decree of the Vice-Chancellor was right, and that this appeal must be dismissed, and with costs.

*Appeal dismissed, with costs.*

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 PRYCE v. BURY.<sup>1</sup>

January 26 and 27, 1854.

*Copyholds — Equitable Mortgage — Tenants in Common in Tail, with Cross Remainders — Costs of Surrender — Foreclosure.*

A and B, brothers, were tenants in common in tail of copyhold property, with cross remainders between them. B. obtained a loan for A from C, for which A gave his promissory note, and deposited the title-deeds with C. as a collateral security, and gave a written memorandum, by which he engaged "to make a formal surrender of my interest in the estate to which the said deeds relate, by way of further security, whenever thereunto required;" and B wrote at the foot, "I join in the deposit." A died unmarried, and without having surrendered to C, or barred the remainders. Upon a bill by C against B, seeking to foreclose the entirety: —

*Held*, affirming the decision of the court below,

First, that this was a good equitable charge, not merely upon A's "interest" in his moiety,

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<sup>1</sup> Before the Lord Chancellor (LORD CRANWORTH) and the Lords Justices.

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but also upon B's estate in remainder, and that B must bear the expense of surrendering that moiety.

Secondly, that the charge extended only to the moiety of the estate which originally belonged to A.

THIS was an appeal from a decision of Sir R. T. Kindersley, V. C., made upon a motion for a decree, (reported 2 Drn. 11, 41; s. c. 21 Eng. Rep. 75.) The short facts were these: Two brothers, John William Bury and Frederick Bury, being tenants in common in tail in possession of certain copyhold property, with cross remainders between them, Frederick Bury applied to the plaintiff, on behalf of his brother, for a loan of 500*l.*, which the plaintiff advanced, taking from John William Bury his promissory note for 500*l.*, and taking also a deposit of the title-deeds and muniments of title relating to the copyhold property, and with them a memorandum in the following terms:—

"The above deeds and muniments are deposited with Charles Pryce, Esq., as collateral security for the sum of 500*l.*, for which I have this day given a promissory note to him; and I hereby engage to make a formal surrender of my interest in the estate to which the said deeds relate, by way of further security, whenever thereunto required.

(Signed)

"JOHN WILLIAM BURY.

"Dated Jan. 28, 1846.

"I join in the deposit.

"FREDERICK BURY."

There was a precisely similar subsequent transaction as to a further loan of 500*l.* by the plaintiff to John William Bury; and there was a loan by the plaintiff of a further sum of 100*l.* to John William Bury on his note of hand, with a parol agreement between the plaintiff and John William Bury that the title-deeds were to remain as a security for that further sum. John William Bury died unmarried, having by his will given all his real and personal estate to his brother Frederick, but in reality he died insolvent. Pryce filed his bill against Frederick Bury, who now was tenant in tail of the entirety, praying to be redeemed, or that the whole estate should be foreclosed. The Vice-Chancellor upheld the bill, so far as to charge the moiety of the estate which formerly belonged to John William Bury in tail with the two sums of 500*l.*, but dismissed the bill, with costs, so far as it sought to charge Frederick Bury's moiety of the estate, and so far as it related to the loan of 100*l.*; and upon the foreclosure decree being spoken to on the minutes, the Vice-Chancellor decided that in case of foreclosure, the defendant, Frederick Bury, should surrender the mortgaged premises at his own expense. The defendant appealed from this decree by way of motion.

*Cooper*, for the plaintiff, contended that the mortgage security ought to be held to extend to the sum of 100*l.* as well as to the two other sums of 500*l.*, and that the entirety of the estate should be charged, and not John William Bury's moiety merely; submitting

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that on these two points the decree of the Vice-Chancellor was wrong; but contended that the Vice-Chancellor was right in directing the defendant to pay the costs attending the surrender; citing, on this point, *Price v. Carver*, 3 My. & C. 157, 162; *Hill v. Price*, Set. Dec. 153; s. c. 1 Dick. 344; *Ball v. Harris*, 8 Sim. 485; and *Parker v. Housefield*, 2 My. & K. 419.

*Glasse* and *De Gez*, for the defendant, in support of the appeal, contended that no part of the estate was liable for this charge; that all that was purported or attempted to be charged was the estate tail of John William Bury in the moiety; but that, as he died without having barred the remainders, the defendant took that moiety free from any charge created by John William Bury; and that the defendant concurring in the deposit was for no other purpose than to evidence his permission to John William Bury depositing the title-deeds, which without his sanction could not properly have been done: that even were it to be considered as if John William Bury had barred the remainders, and thereby created a good charge upon his moiety, still, the defendant could not be looked upon as more than a surety for his brother; and that the court would not, by implication, extend to personal contract of John William Bury to his surety, and oblige him to pay the costs of perfecting his title as mortgagee; citing *Bibby v. Shuffelebotham*, Beam. Costs, 30; *Tipping v. Power*, 1 Hare, 405; *Ex parte Alexander*, 2 Gl. & Ja. 273; *Metcalf v. The Archbishop of York*, 1 My. & C. 547; *Dance v. Girdler*, 1 N. R. 34; and *Lacon v. Mertins*, 3 Atk. 1. Lastly, they contended that if John William Bury's moiety was to be considered as charged by the equitable mortgage, the defendant must be treated as a trustee for the mortgagee, in which case he would be entitled to his costs.

*Cooper* replied.

LORD CHANCELLOR, (LORD CRANWORTH.) The bill in this case was filed by a mortgagee claiming a security over the entirety of this property, which belonged to two brothers, in moieties, as tenants in common in tail, with cross remainders between them. At the hearing the bill was dismissed, with costs, so far as it sought to affect the original moiety of Frederick Bury, but was established as against John William Bury's original moiety; and the ordinary decree for a mortgagee was made in favor of the plaintiff against the moiety of John William Bury, who at the time of the deposit was tenant in tail of that moiety, but which moiety is now vested in Frederick Bury as remainder-man. The defendant, Frederick Bury, has appealed against this decree. The counsel for the plaintiff, the mortgagee, insisted upon two points: First, that the security ought to be held to extend to the 100*l.* advanced by the plaintiff to John William Bury, in August, 1846, as well as to the other loans made upon the deposit. That point I consider wholly untenable. Secondly, that the property charged was not the moiety only, but the entirety; but I think that the obvious meaning of the memorandum was, that the charge extended to the moiety of John

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William Bury only. Then the defendant (the appellant) made two points in argument: one of them we disposed of at once, which was, that nothing was charged except the estate tail of John William Bury; but we are of opinion that that was clearly not the intention of the parties, although the expression is, "my interest in the estate," but that it clearly meant that the moiety of the estate of which John William Bury was then tenant in tail should be the security; and Frederick Bury concurred in that, and assented to the mortgage. The only other point was this—the decree giving the usual relief in the case of an equitable mortgage to the plaintiff provides that the defendant, the mortgagor, shall surrender the moiety of the estate at his own expense. To this the defendant objects. Now, it is quite clear, that if he was the mortgagor in the ordinary sense, he would be obliged to make the surrender at his own expense, for the contract was, when required, to perfect the security upon the property in question; and had it been a legal mortgage he would have been bound under his covenant to make the surrender at his own expense. Then the argument which was pressed by Mr. Glasse and Mr. De Gex was, that in this case the defendant is not to be considered as a mortgagor, or as having entered into any such engagement; that what he did amounted to no more than saying that his brother was at liberty to part with the title-deeds for a temporary purpose, so far as they related to his interest in the estate; or, at the utmost, that it amounted to an admission that the interest of his brother in the estate should be charged, but that this amounted to no personal engagement on his part. We have given this argument the fullest attention in our power, and we agree in thinking that any such modification of the terms of this memorandum would be a refinement very dangerous to enter into; and we think that this transaction must be taken to be, in the ordinary mode, a mortgage by deposit, the parties having an interest in the same estate—one in possession, the other in remainder—concurring in depositing the deeds as a security, and that both must be considered as depositors. That a party in the position of Frederick might have agreed to allow of the deposit of the title-deeds, and at the same time have said, "I personally, or my estate, will not be liable to any thing," admits of no doubt; but my opinion is that he has not done this, but he has concurred with his brother in making an equitable mortgage of the one moiety of the estate.

The LORDS JUSTICES concurred.

*Appeal dismissed, with costs.*

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 Smith v. Adams.
 

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SMITH v. ADAMS.<sup>1</sup>

July 24 and 25, and August 1, 1854.

*Copyholds — Surrenderee of, dying before Admission — Widow of, not entitled to Freebench — Dower Act, 3 & 4 Will. 4, c. 105.*

By the custom of a manor the widow of a tenant was entitled for her freebench to an estate for life in one moiety of the copyhold tenement of which her husband died seised. A copyholder of this manor, seised of tenements to him and his heirs at the will of the lord, according to the custom of the manor, sold them, and, having received the whole or the greater part of the purchase-money, surrendered them to the use of the purchaser and his heirs, in the manner usual on a completed purchase of copyhold property, part of the manor; and the surrender having been duly entered on the rolls, and the purchaser having taken possession of the tenements, the purchaser, without having been admitted, and therefore while the seller remained in fact tenant on the rolls, died; whereupon the customary heir of the purchaser entered, as heir, into the possession of the tenements, and remained in that character in possession of them, but without having been admitted, or having demanded or sought to be admitted to them:—

*Held*, that the widow of the purchaser was not either legally or equitably entitled to freebench against the heir; though if her husband, the purchaser, had been admitted under the surrender in his favor, she would clearly have been so entitled.

*Held* also, that the Dower Act, 3 & 4 Will. 4, c. 105, did not extend to or affect the case, although the widow was not married on or before the 1st January, 1834.

THIS was an appeal from the decision of Sir J. Romilly, M. R., of which a report is given, 18 Jur. 564. The facts of the case, as stated in the judgment of Sir G. J. Turner, L. J., were the following: By the custom of the manor of Weedon Beck, in the county of Northampton, the widow of a copyhold tenant is entitled for her freebench to an estate for life in one moiety of the copyhold tenement of which her husband died seised. In the year 1845, Samuel Baseley was seised of some copyhold tenements holden of this manor, subject to the life estate of Ann Baseley, who was the widow of the former owner, and as such entitled to freebench in a moiety thereof; and in the month of July, 1845, Samuel Baseley sold the copyhold tenements of which he was seised, to George Smith, subject to the estate of Ann. Samuel Baseley at this time stood admitted to these copyhold tenements, and, upon the completion of the sale, he and his wife surrendered them out of court to the use of George Smith, his heirs and assigns, according to the custom of the manor. This surrender was duly obtained, but no admission was then, or has at any time since, been taken out. George Smith, however, entered into possession of the surrendered copyholds. He died on the 22d February, 1851, leaving both Samuel Baseley and Ann surviving him, and he left the appellant, John Smith, his heir according to the custom of the manor, and the respondent, Mary Smith, his widow. In this state of circumstances the respondent, Mary Smith, claimed

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<sup>1</sup> Before the Lords Justices the Right Hon. Sir JAMES L. KNIGHT BRUCE and the Right Hon. Sir G. J. TURNER.

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to be entitled to freebench of the entirety of the copyhold tenements; and, the question having been brought before the Master of the Rolls, he decided that she was not entitled to freebench in respect to the moiety of the tenements to which Ann Baseley was entitled for life; but as to the other moiety of the tenements, he declared that the appellant, the heir, was a trustee for her during her life, or until his admission; directing an account of the rents and profits of that other moiety of the estate received by the heir, and payment by the heir to the respondent, Mary Smith, the widow, of one moiety of what the appellant had so received; and also reserved liberty to the respondent, Mary Smith, the widow, to apply to the court for a commission to set out the metes and bounds upon the event of the heir being admitted to the copyholds. Mary Smith, the widow, has not appealed from this decision, so far as it is unfavorable to her, as to the moiety of Ann; but John Smith, the heir, has appealed from the decision as to the other moiety. The question, therefore, which we are called upon to decide is, whether the decree is right in having declared John Smith, the heir to be a trustee until his admission, and in having reserved to the widow liberty to apply for a commission upon his becoming entitled to the copyholds.

*Lee, Q. C., and Wright*, appeared to support the appeal.

*Swanston, Q. C., and Jolliffe*, contra, for the heir.

*Cox*, for other parties.

*Lee* replied.

The following authorities were referred to: *Chaplin v. Chaplin*, 3 P. Wms. 229; *Wainwright v. Elwell*, 1 Mod. 627; *Doe d. Vernon v. Vernon*, 7 East, 8; *Doe d. Toftfield v. Toftfield*, 11 East, 246; *Glass v. Richardson*, 2 De G., Mac., & G. 658; s. c. 15 Eng. Rep. 383; *Godwin v. Winsmore*, 2 Atk. 525; *Vaughan d. Atkins v. Atkins*, 5 Burr. 2765; *Butler and Baker's case*, 3 Rep. 25; *Selwyn v. Selwyn*, 2 Burr. 1131; *Doe d. Jefferys v. Hicks*, 2 Wils. 13; *Burgess v. Wheale*, 1 Eden, 177; *Rex v. Mildmay*, 5 B. & Ad. 254; *Lucas v. Comerford*, 3 Bro. C. C. 166; *Casborne v. Scarfe*, Id. 320; *Rex v. Bennett*, 2 T. R. 197; *Gale v. Gale*, 2 Cox, 136; *Doe d. Shrewen v. Wroot*, 5 East, 132; *Lord Grenville v. Blyth*, 16 Ves. 224; *Edwards v. Champion*, 3 De G., Mac., & G. 202; s. c. 21 Eng. Rep. 230; *King v. Turner*, 1 My. & K. 456; *Bennington v. Hall*, 16 East, 208; *Benson v. Scott*, 1 Salk. 185; *Perrin v. Blake*, 4 Burr. 2579; 1 Scriv. Copyh. 72; Bac. Ab., "Copyhold," E.; 1 Rep. Husb. & Wife, 352; Gilb. Ten. 26; and Shelf. Real Prop. Stat. 261.

Knight Bruce, L. J. The argument upon this appeal was so conducted, that, notwithstanding the frame of the bill and the language of the answer of the defendant, John Smith, the appellant, I assumed then, and still assume, all parties to have been well con-

tent that the decree under appeal should not extend to any other subject than the claim of the plaintiff to freebench in the tenements comprised in the surrender and deed, dated, respectively, the 14th July, 1845, of which there are amongst the papers what I understand to be admitted copies; nor do I suppose that any one of the parties wishes our attention to be addressed to any thing else. This I mention because, on the face of the pleadings, it would seem that the decree ought to have been extended to other matters. I shall confine myself, however, as I have intimated, to the question whether, legally or equitably, the plaintiff, as the widow of George Smith, is entitled to freebench in the tenements comprised in the surrender and deed that I have mentioned—a question which (to omit Ann Baseley, now dead, and the debts now, as I collect, paid off—omissions that do no injustice to the plaintiff) may be thus stated, namely, whether, where a copyholder, seised of tenements to him and his heirs, at the will of the lord, according to the custom of the manor, has sold them, and, having received the whole or the greater part of the purchase-money, has surrendered them to the use of the purchaser and his heirs, in the manner usual on a completed purchase of copyhold property, and the surrender having been duly entered on the rolls, and, the purchaser having taken possession of the tenements, the purchaser, without having been admitted, and, therefore, while the seller remains, in fact, tenant on the rolls, dies—upon which event the customary heir of the purchaser enters, as heir, into possession of the tenements, and remains in that character in possession of them, but has not been admitted, nor has demanded or sought to be admitted to them—the widow of the purchaser is legally and equitably entitled to freebench against the heir, it being clear and conceded that if her husband had been admitted under the surrender in his favor, she would have been entitled to freebench. The affirmative of this proposition, so far at least as the equitable title is concerned, was decided in the cause at the rolls thus: “His Honor doth declare that the defendant, John Smith, the heir of the testator in the pleadings mentioned,” &c. [His lordship read the decree made at the rolls.] With this decree the plaintiff, the widow, is satisfied; the appellant being the defendant, John Smith, and customary heir, who, so far as the question that I have stated is concerned, denies her right at law equally as here. The cause forms no exception from what may seem of late to have been the general rule of the Court of Chancery in copyhold cases, namely, that there should be a difference of opinion; nor can it be matter of surprise that various views should often be taken of the strange and uncouth rules of those habits and manners which produced copyhold tenure—a tenure that I trust, under the operation of a recent statute, for the practical and useful character of which we are, I believe, mainly indebted to the present Lord Chancellor, will ere long be buried with a cognate, though a greater and more famous, oppressor—the tenure in chivalry. In the mean time, as every thing has its use, we may be content to consider an occasional controversy upon copyholds, to have some value as a remembrancer of our still imperfect civilization.

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The opinions of my learned brother and myself continue to be, that the Dower Act, 3 & 4 Will. 4, c. 105, does not extend to such a case as the present, or affect it, although the plaintiff was not married on or before the 1st January, 1834. The first point for determination then is, whether, independently of the statute, and upon the assumption that the plaintiff has not acquired a legal title, nor is now, nor has been in a condition to compel, by means of a court of law, the lord or the heir to confer on her a legal title to the freebench which she claims, she is entitled to the assistance of a court of equity; and I am of opinion that this question must be answered against the plaintiff. It is a case *positivi juris* merely — one to be decided by precedent and by analogy to precedents, and not in any sense, or not in any other sense, upon a notion which is or may be reasonable. But it appears to me that she is supported in it neither by any precedent now to be regarded as of authority, nor by analogy to any such precedent; and that, on the contrary, there are authoritative precedents which directly, or by analogy, support the heir's contention in this respect. I need scarcely refer to *Chaplin v. Chaplin*; *Casborne v. Scarfe*; *Godwin v. Winsmore*; *Dixon v. Saville*, 1 Bro. C. C. 325; and *Forder v. Wade*, 4 Bro. C. C. 521; but I will allow myself to read the chief part of Lord Redesdale's instructive judgment, in *D'Arcy v. Blake*, 2 Sch. & L. 388, upon the general principle on which courts of equity have proceeded in cases of dower: "The general principle on which courts of equity have proceeded in cases of dower is, that dower is to be considered a mere legal right, and that equity ought not to create the right where it does not subsist at law; that, therefore, there can be no dower of an equity of redemption reserved upon a mortgage in fee, though there may be upon an equity of redemption upon a mortgage for a term of years, because in that case the law gives dower subject to the term. A court of equity will assist a widow by putting a term out of her way where third persons are not interested. But against a purchaser, a court of equity will not give that assistance, as in *Lady Radnor v. Vanderbilt*, Prec. Ch. 65, by the name of *Lady Radnor v. Rotheram*, Show. Parl. Cas. 96. The difficulty in which the courts of equity have been involved with respect to dower, I apprehend, originally arose thus: They had assumed as a principle, in acting upon trusts, to follow the law; and, according to this principle, they ought, in all cases where rights attached on legal estates, to have attached the same rights upon trusts, and, consequently, to have given dower upon an equitable estate. It was found, however, that, in cases of dower, this principle, if pursued to the utmost, would affect the title to a large portion of the estates of the country; for that parties had been acting upon the footing of dower on a contrary principle, and had supposed that, by a creation of a trust, the right of dower would be prevented from attaching. Many persons had purchased under this idea, and the country would have been thrown into the utmost confusion if courts of equity had followed their general rule with respect to trusts in the cases of dower. But the same objection did not apply to tenancy by the courtesy, for no person would purchase an estate subject to tenancy

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by the courtesy without the concurrence of the person in whom that right was vested. This I take to be the reason of the distinction between dower and tenancy by the courtesy. Pending the coverture, a woman could not alien without her husband; and, therefore, nothing she could do could be understood by a purchaser to affect his interest; and, where the husband was seised or entitled in his own right, he had full power of disposing, except so far as dower might attach; and the general opinion having long been that dower was a mere legal right, and that, as the existence of a trust estate previously created prevented the right of dower attaching at law, it would also protect the property from all claim of dower in equity; and, many titles depending on this opinion, it was found that it would be mischief, in this instance, to the general principle, that equity should follow the law; and it has been so long and so clearly settled, that a woman should not have dower in equity who is not entitled at law, that it would be shaking every thing to attempt to disturb the rules. In point of remedy, a woman claiming dower may be assisted in equity; a court of equity will put out of her way a term which prevents her obtaining possession at law. But this is only as against an heir or volunteer, not a purchaser, the heir or volunteer being considered as claiming in no better right than she does. When, therefore, any question of dower has arisen in courts of equity, and doubts have been entertained of the title to dower, the constant practice in England has been to put the widow to bring her writ of dower at law. The courts will assist her in trying her right, and enjoying the benefit of it, if determined at law in her favor, by giving her a discovery of deeds — by ascertaining metes and bounds; and they do not require her to execute the writ with all the formalities necessary at law; and, the right being ascertained by judgment at law, will give her possession according to her right; but, still, they require that the question of her title to dower, if subject to doubt, should be determined at law.

What was thrown out by Sir Joseph Jekyll in *Banks v. Sutton*, 2 P. Wms. 700, has been long overruled. "The rule of courts of equity, so far as it excludes a widow from dower of an equitable estate against an heir or volunteer, goes, perhaps, beyond the reason of the rule. But I have called this subject to my recollection a good deal by looking into the authorities since this case was first mentioned; and the decisions to the full extent are so old, so strong, and so numerous — so generally adopted in every book on the subject, and so considered as settled law — that it would be very wrong to attempt at this time to alter them." In the present instance, if the property purchased by George Smith, in 1845, had been, at his request, surrendered by the vendor to the use of a third person and his heirs, according to the custom of the manor, and that third person had been admitted under the surrender accordingly, so as to become complete tenant to the lord on the rolls, and had then, in the husband's lifetime, by his desire, executed a declaration of trust, acknowledging him to be the beneficial owner, and the estate, to be vested in the tenant on the rolls merely as trustee for the husband — or if, without surrendering at all,

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the vendor had, by a purchaser's desire, merely executed a declaration of trust of the tenements in his favor—or if the purchase had at his death been in no sense completed, and rested merely in contract, and had been completed by the heir after his death with his own, or the purchaser's money—it seems to me perfectly clear that not in any one of those states of circumstances could the plaintiff have had any legal, or any equitable right to claim freebench, the statute being considered as not applicable. I think that she has in equity no better title, in the actual circumstances of the case—a remark subject to the qualification, that, if she has a legal title or a legal right, this court will probably assist her, as it assists a widow legally entitled to dower out of freehold estate. The husband, who, it need not be repeated, did not take by descent, having never been admitted, his heirs have also never been admitted; and, without saying what I might have thought of the matter if the heir had acted fraudulently, I cannot think that the mere fact, that though in possession as heir, and though having been admitted to the other tenements, of which, as ancestor, the husband died indisputably seised in fee as a copyholder according to the custom of the manor, the heir has not been, nor ought to be, admitted to the tenements in question, amounts to conduct that the plaintiff is entitled to characterize as a fraud upon her, or as a breach of duty to her. There is nothing else; and therefore there is, I apprehend, nothing against his conduct, however much it may have been actuated by wishes adverse to the plaintiff; and as she could not, I conceive, have required in her husband's lifetime that he should be admitted, or have complained of him for not having taken that step, so I do not see that she had any better right in this respect against the heir. Perhaps it would be a stronger case than that before us, if the vendor and heir, after George Smith's death, had agreed together to conceal that surrender, or treat it as a nullity, and so constitute the vendor formally and expressly a trustee for the heir. But I am not prepared to say that even so the plaintiff would have had relief.

Then, upon the merely legal view of the matter, with reference to which the judgment in *Doe v. Clift*, 12 Ad. & El. 575, is worth consulting, I conceive, that as in *Vaughan d. Alkins v. Alkins*, (an authority concerning which I wish to be understood as intimating neither assent nor dissent; but I may remark, in passing, that Mr. Lee denies having intended at the rolls to represent it as in his opinion a good, or a binding precedent,) the heir had been admitted, it does not bind the plaintiff—it does not assist the plaintiff, who, according to my impression, is without any legal title, without any claim available in a court of law—the custom of freebench, as alleged, appearing to me not to extend to her case. Now, I consider that, as matters are, the husband of the plaintiff cannot be taken, by relation, or otherwise, to have been seised of those tenements within the meaning of the custom; and the doubt that, especially considering what is said by the court in *Doe v. Clift*, 12 Ad. & El. 579, I entertain upon this merely legal point, namely, whether there is at present any *locus standi* for her in a court of law, being slight, if any, I am not in favor of troub-

ling a common law judge to hear an argument upon it with us. But supposing the plaintiff desired to try what, by way of mandamus, or otherwise, she can do in a court of law, I am willing to retain the bill for a twelvemonth in order that she may do so, and, if successful, come hither for the details of relief. If she does elect to have the bill retained for that purpose, it will be proper, I think, that the costs of the suit should be reserved. If she shall elect not to proceed at law, and that the bill may now be dismissed, it may then, I think, be dismissed without costs.

TURNER, L. J. The facts of this case, so far as they are necessary to be stated, are extremely simple. [His lordship stated the facts of the case, the decision at the rolls, and the question upon the appeal, as they are detailed above. It is, as I apprehend, perfectly well settled now that there is not freebench in a mere equitable estate in copyholds, any more than there is dower in a mere trust estate in freeholds; and in determining this case, therefore, we must lay out of consideration the fact that Samuel Baseley stood in the relation of trustee for Smith. The respondent, the widow, can found no title on that relation, and derive no benefit from it. Her right to freebench, like other rights in copyhold estates, depends upon the custom of the manor; and in order to entitle her to freebench, she must bring herself within that custom. The custom of this manor is in favor of the widows of tenants dying seised; and the first consideration therefore is, did George Smith, the purchaser, die seised of these copyhold tenements? I think it is clear he did not. Samuel Baseley, the vendor, notwithstanding the surrender, continued tenant to the lord; and a surrenderee, I apprehend, has no estate in the premises until actual admission. He has not even the right to enter upon the tenements surrendered to him — he can do so only by the permission of the surrenderor; and, entering by the surrenderor's permission, he becomes a mere tenant at will. George Smith, therefore, so far from dying seised of these tenements, never had any estate whatever in them; and if, therefore, the custom is to govern, I see no ground on which this case can be decided in favor of the widow. It was, indeed, argued, that as there was dower of freehold upon a seisin in law, on the ground that the wife could not compel the husband to complete the seisin, so there should be freebench in these copyholds upon the same ground; but the answer to that argument is, that there was here no estate for which the seisin could be taken. It was argued, however, that George Smith had a right to be admitted to these tenements, and that his heirs have now; and by that right being exercised, the heir being admitted, the admission may relate back to the surrender, and the widow be entitled to freebench; and the judgment of the Master of the Rolls seems merely to have proceeded upon that ground. I do not think it necessary or pertinent to give any opinion whatever upon this question of relation; but, assuming the point to be in favor of the widow, I am of opinion that this decree cannot be maintained upon that ground. In the absence of any fraud, or collusion between the heir and the lord, or the heir and the surrenderor, (and no such

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fraud, or collusion is here alleged,) the case cannot, I think, in this point of view, be put higher than this—that upon the admission being taken by the heir, the widow shall be entitled to freebench.

But the question before us is not what the rights of the widow will be when the heir is admitted, but what are her present rights. This decree does not go so far as to affirm that the heir is bound to take admission at the instance of the widow; and certainly it could not properly do so, for this would be to put it in the power of the ancestor's widow to determine the character of the estate of the heir, and to decide whether his estate should be legal or equitable, and whether his widow should be entitled to freebench or not; but if the widow has no present right to freebench, (and I see no ground on which she can claim such right,) and has no right to compel the heir to do the act which would give her the right to freebench, I cannot see my way to impose a trust upon the heir. Heirs at law may be trustees where there is an existing equitable estate; but here there is no existing estate in the widow; and if there were an estate in her, that estate would not be equitable. Heirs at law, again, may be trustees where there has been fraud; but it cannot be said that it is fraud in the heir not to be admitted. Again: heirs may be trustees where the possession has been obtained by breach of confidence, or is held, contrary to the ancestor's express intention, for the benefit of favored objects, as in cases of confusion of boundaries and of supplying surrenders; but those cases rest, as to the former class, upon breach of duty, which cannot be alleged here; and as to the latter class, upon intention which is foreign to the question of dower and freebench. There may be other cases in which trusts may attach upon heirs at law; but to convert the heir into a trustee in a case like the present, seems to me, with deference to the Master of the Rolls, to be going far beyond any authority, and, I may add, beyond any principle. It is, in effect, to create an estate which the law does not recognize. In my opinion, therefore, the decree cannot be supported. If the widow can make any thing of the case at law, I think we ought not to deprive her of the opportunity of trying her title there; but I do not see how she can possibly succeed; and certainly I do not feel any such difficulty upon the case as would warrant us in asking for the assistance of a judge upon it. I think, therefore, the decree which my learned brother proposes is the right decree; and it is for the plaintiff to elect whether she will try this question at law, at the peril of having all the costs reserved, or whether she will take a dismissal of the bill, as to her claim for freebench, without costs.

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*Ex parte Bailey; In re Barrel.*

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*Ex parte BAILEY and another; In re BARREL, a Bankrupt.*<sup>1</sup>

April 22 and 28, 1854.

*Bankrupt Law Consolidation Act—Preference of Creditor under Sect. 167 not extended to Benefit Building Societies—4 & 5 Will. 4, c. 40, s. 12, and 6 & 7 Will. 4, c. 32, s. 4, Repealed by the Bankrupt Law Consolidation Act.*

The treasurer of a benefit building society held not to be "a person appointed to or employed in any office in any society established under any of the acts relating to friendly societies," within the meaning of sect. 167 of the Bankrupt Law Consolidation Act.

Sect. 12 of the Friendly Societies Act, 4 & 5 Will. 4, c. 40, and s. 4, of the Benefit Building Societies Act, 6 & 7 Will. 4, c. 32, are repealed by the Bankrupt Law Consolidation Act.

THE bankrupt in this case, at the date of his bankruptcy, and for some years previously, filled the office of treasurer to the Barnstaple and Chafford Benefit Building Society, and at the date of the bankruptcy was indebted to the society in the sum of 777*l.* 14*s.* 9*d.* in respect of moneys received by him on account of the society by virtue of his office of treasurer. The trustees of the society now appealed from the decision of the commissioner, refusing their application to be paid that sum in full out of the assets of the bankrupt under the provisions of the 167th section of the Bankrupt Law Consolidation Act, which enacts, "that if any person already appointed to or employed, or who may be hereafter appointed to or employed, in any office in any society established under any of the acts relating to friendly societies, and being intrusted with the keeping of the accounts, or having in his hands or possession by virtue of his office or employment any moneys or effects belonging to such society, or any deeds or securities relating to the same, shall have been or shall become bankrupt, the court shall, upon application made by the order of any such society, or any committee thereof, or the major part of them assembled at any meeting thereof, order to payment and delivery over to be made to such society, or to such person as such society or committee may appoint, of all moneys and other things belonging to such society, and shall also order payment out of the estate and effects of the bankrupt of all sums of money remaining due which the bankrupt received by virtue of his said office or employment, before any other of his debts are paid or satisfied." The commissioner's decision proceeded on the ground that the trustees of the society had not strictly conformed to the rules of the society with regard to the security to be required of the treasurer, and to the checking of his accounts, and that, where that was so, the privilege

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<sup>1</sup> Before the Lords Justices the Right Hon. Sir JAMES L. KNIGHT BRUCE and the Right Hon. Sir G. J. TURNER.

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*Ex parte Bailey; In re Barrel.*

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conferred by the 167th section upon societies comprised within it could not be insisted upon.

*Swanston, Q. C.*, and *Terrell*, in support of the appeal, referred to the 12th section of the Friendly Societies Act, 4 & 5 Will. 4, c. 40, whereby it is provided, "that if any person already appointed, or who may hereafter be appointed, to any office in a society established under the said recited act<sup>1</sup> or this act, and being intrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any moneys or effects belonging to such society, or any deeds or securities relating to the same, shall die or become a bankrupt or insolvent, or have any execution or attachment or other process issued, or action or diligence raised against his lands, goods, chattels, or effects, or property, or estate, heritable or movable, or make any assignment, disposition, assignation, or other conveyance thereof for the benefit of his creditors, his heirs, executors, administrators, or assignees, or other persons having legal right, or the sheriff or other officer executing such process, or the party using such action or diligence, shall, within forty days after demand made in writing by the order of any such society or committee thereof, or the major part of them assembled at any meeting thereof, deliver and pay over all moneys and other things belonging to such society, to such person, as such society or committee shall appoint, and shall pay out of the estates, assets, or effects, heritable or movable, of such person, all sums of money remaining due which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process or using such diligence, and all such assets, lands, goods, chattels, property, estates, and effects shall be bound to the payment and discharge thereof accordingly;" and to the 4th section of statute 6 & 7 Will. 4, c. 32, which provides, "that all the provisions of a certain act made and passed in the tenth year of the reign of his late Majesty King George the Fourth, intituled 'An act to consolidate and amend the laws relating to friendly societies,' and also the provisions of a certain other act made and passed in the fourth and fifth years of the reign of his present Majesty King William the Fourth, intituled 'An act to amend an act to the tenth year of his late Majesty King George the Fourth, to consolidate and amend the laws relating to friendly societies, so far as the same, or any part thereof, may be applicable to the purpose of any benefit building society, and to the framing, certifying enrolling, and altering the rules thereof,' shall extend and apply to such benefit building society, and the rules thereof, in such and the same manner as if the provisions had been herein expressly reenacted;" and they

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<sup>1</sup> 10 Geo. 4, c. 56, intituled "An act to consolidate and amend the laws relating to Friendly Societies."

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*Ex parte Bailey; In re Barrel.*

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argued that the society was entitled to the preference asked under the 167th section of the Consolidation Act, or, at all events, under the combined operation of the two other acts to which they had referred.

*Roll, Q. C.*, and *Bayley*, contra, argued, that as societies established under the acts relating to friendly societies were the only societies mentioned in the 167th section of the Bankrupt Law Consolidation Act, the benefit of that section could not be extended to benefit building societies which were not established under those acts; and that inasmuch as the Bankrupt Law Consolidation Act had repealed all other acts and parts of acts inconsistent with its provisions, it must be considered as having repealed the acts 4 & 5 Will. 4, c. 40, s. 12, and 6 & 7 Will. 4, c. 32, s. 4, the former of which directed the assignees to pay the money in full, and therefore was inconsistent with the 167th section of the Consolidation Act, which directed the court to make the payment, and consequently was repealed by the Consolidation Act; and the 4 & 5 Will. 4, c. 40, s. 12, being thus repealed, its accessory, so far as related to this question, the 6 & 7 Will. 4, c. 32, s. 4, was repealed also. [They also relied upon the grounds upon which the commissioner's decision was founded. They cited *Ex parte Ross*, 6 Ves. 802; *Ex parte The Stamford Friendly Society*, 15 Ves. 280; *Re The Heanor Friendly Society*, 1 Beav. 508; and *Giles v. Walker*, 6 C. B. 662.]

*Swanston, Q. C.*, in reply.

April 28. KNIGHT BRUCE, L. J., said, that assuming, in favor of the petitioners, but without deciding it, that if the Bankrupt Law Consolidation Act had not passed, they would be entitled substantially to what they asked, still, there was an insurmountable difficulty in their way, arising from that act, which, properly construed, precluded their claim, unless it fell within the 167th section; but this section, he considered, could not be interpreted as extending to the petitioners' case. He was of opinion, therefore, that, even on the assumption he had stated, perhaps too favorable a one to the petitioners, the petition should be dismissed, with costs.

TURNER, L. J., said one of the grounds on which the petitioners rested their case was the 167th section of the Bankrupt Law Consolidation Act; and it was also argued on their behalf, that if they were not entitled to the relief prayed by their petition under the provisions of the Consolidation Act, they were so entitled under the combined operation of the 12th section of the act 4 & 5 Will. 4, c. 40, and the 4th section of the act 6 & 7 Will. 4, c. 32. He was of opinion, however, that the appellants were not entitled under any of those acts to the relief asked by their petition. The 167th section of the Consolidation Act was in terms confined to societies established under the acts relating to friendly societies, and the society in question was established, not under those acts, but under the Benefit Building Societies Act, 6 & 7 Will. 4, c. 32. The legisla-

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ture, in passing the Bankrupt Law Consolidation Act, must be presumed to have had, and no doubt had, under its view both the acts relating to friendly societies and those relating to building societies, and had thought proper to limit the particular relief granted by the 167th section of the Consolidation Act to societies of the former class; and the court had no power to extend it to other societies. If, therefore, the appellants had any claim to relief, their right must be founded on the combined operation of the earlier acts. But the Consolidation Act, by its 1st section, had repealed not only the acts specified in the schedule to the act, but all other acts inconsistent with its provisions; and by another of its provisions, the Consolidation Act had appropriated the whole of the bankrupt's estate to the payment of creditors who, according to the act, are entitled to be paid in full; and, subject to that, had directed it to be divided amongst the other creditors ratably; and it would be inconsistent with this provision that payment should be made in full of a debt to any creditor which was not by the act directed to be paid in full. The earlier enactments on this subject, had, consequently, been repealed by the Consolidation Act; and he was, therefore, of opinion that the petition should be dismissed, with costs. The commissioner had disposed of the case on other grounds, as to which, without meaning to dissent, it was not necessary to give any opinion. The petitioners having come here to obtain a preference, to which, in the judgment of the court, they were not entitled, they must pay costs.

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 DRYSDALE v. MACE.

March 16, 1854.

*Vendor and Purchaser — Specific Performance — Conditions of Sale — Vagueness — Expressions leading to a wrong Conclusion — Production of Records Fees.*

An annuity was granted for the lives of four persons, and the lives and life of the survivors and survivor of them, secured by a term in a reversion of a freehold estate, and the reversion was offered for sale. One of the conditions of the sale was, that certain evidence that "a life annuity granted to" A. B. had not been paid or claimed for twenty years, should be conclusive evidence that the annuity and term had determined:—

*Held*, affirming a decision of one of the Vice-Chancellors, that the condition was not binding, as the condition was one so worded as to lead a purchaser to a definite conclusion contrary to the real facts of the case.

Where the court requires for its own information the production of a record from the record office, no fee ought to be paid for the same.

THIS was an appeal from a decision of Vice-Chancellor Stuart, dismissing the plaintiff's claim for specific performance, with costs.

The facts may be most conveniently stated in a narrative form collected from the pleadings and evidence. In February, 1853, the

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reversion in fee of freehold houses had been offered for sale and bought in, and Mr. Mace subsequently called at the office of the auctioneer, and offered to buy it for 850*l*. He, thereupon, received a copy of the conditions of sale which had formerly been prepared, and was informed that the property was to be sold subject thereto, and he was advised by the auctioneer to consult his solicitor. Among the conditions of sale was this: "Ninth, that the statement in a deed, dated the 21st December, 1839, that a life annuity, granted to George Morris, in April, 1824, had not been paid, or claimed for eight years previously, and which will be supported by a declaration by the vendor, that no claim has been made on him since the decease of his testator, in 1841, and that he believes that the same has not been claimed for the last twenty years, shall be conclusive of the fact of such annuity having determined, and of the cesser of the term limited for securing the same." Mr. Mace having consulted his solicitor, called again at the auctioneer's office, and said that, as it appeared by the ninth condition, there was an annuity on the property, it was "unsatisfactory, and lessened the value." To this the auctioneer replied: "Calculate how much the annuity is worth, as though you had to pay it, and then you cannot do wrong. I do not understand how it is, and cannot tell you any more than there is in the particulars of sale." Mr. Mace signed a contract to purchase, subject to the conditions of sale, for 850*l*, and said, in answer to an observation made to him as to the cheapness of the bargain, "I am giving all it is worth, considering the doubt about the annuity." On the abstract being delivered, a recital was found, (in one of the abstracted deeds,) of an indenture, dated the 8th of April, 1824, by which the then owner of the reversion, one Mr. Noy, who was entitled after the death of Mr. E. Noy and S. Johns, covenanted to pay an annuity of 36*l*. "to George Morris, his executors, administrators and assigns, for the lives and in manner therein mentioned," and he granted the houses, subject to the life estates, to a trustee for a term of 500 years, upon trust, in case of arrears for one month, to sell and to hold the money upon certain trusts for securing the annuity. After the contract was signed, the executors of George Morris, who had died, made some demand upon Mr. Drysdale, who had become the owner of the reversion in respect of the annuity, and upon the evidence it was not clear that all the lives had dropped. Mr. Mace refused to complete, and thereupon the claim was filed, and was dismissed, with costs, and hence the appeal. There was no evidence to show what were the lives for which the annuity was granted. The deed was not forthcoming, nor was there any draft of it to be found, so that recourse was had to the enrolment, from which it appeared that the lives were four, and the annuity was payable during the four lives, "and the lives and life of the survivors and survivor of them."

*Malins*, and *Stevens*, for the appellant, the plaintiff, argued that the purchaser was bound by the ninth condition, and must accept the title; that condition being clear, plain, and intelligible. There it was stated what evidence should be deemed conclusive of a matter of fact; and

the mere circumstance that the fact turned out otherwise than stated, was wholly immaterial. Such had been the decision of the late Vice-Chancellor Parker, in the case of *Hume v. Bentley*, 5 De Gex & Sm. 520; s. c. 15 Eng. Rep. 1, where the conditions of sale of a leasehold estate provided, "that the lessor's title will not be shown, and shall not be inquired into," and it turning out that the lessor's title appeared upon certain acts of parliament which the purchaser had produced in the master's office, and from which it was plain that the lessor had no power whatever to lease the property, yet the Vice-Chancellor decreed specific performance, and observed that the purchaser was precluded from going into any inquiry as to the lessor's title by the terms of the condition, and that no force would be attributed to the words "the title shall not be inquired into," except as meaning that it should be accepted by the purchaser without objection or inquiry.

[TURNER, L. J. Is there any other case in which the court has compelled the purchaser to take a thoroughly bad title?]

Here, however, it was not necessary to go so far, as the cases which related to conditions putting a purchaser upon inquiry were sufficient, such as *Fenton v. Browne*, 14 Ves. 144, and *Trower v. Newcome*, 3 Mer. 704; and not only was the purchaser put upon inquiry, but it is proved that he did make inquiry, and consulted his solicitor even before he signed the contract. He purchased with the chance of paying the annuity, and it was a matter of calculation with him whether he would have to pay the annuity, and if so, for how long, and probably no more than six years' arrears could be recovered.

[TURNER, L. J. *Southby v. Hutt*, 2 Myl. & Cr. 207, is important upon the construction of conditions of sale; and there is also the case of *Warren v. Richardson*, Younge, 1, showing that a bad title will not be forced on a purchaser.

[KNIGHT BRUCE, L. J. *Hume v. Bentley* was during the argument mistakenly attributed to me. I never decided such a proposition as that case seems to establish, though I say, with the utmost sincerity, that it was decided by an authority, to say the least of it, quite as good as mine. I may very safely apply the first words of my judgment, in *Seaton v. Mapp*, 2 Coll. C. C. 556, to the present case: "I do not greatly admire the case on either side," — and I may as well proceed, "but I think, and have always thought, that when a vendor sells property under stipulations which are against common right, and places a purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent upon the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself." Lord St. Leonards has approved of that principle, but with a doubt whether it was correctly applied in that case.

<sup>1</sup> See Sugd. Concise View, p. 243, where, after citing the above passage, "and accordingly in the case in which this observation was made, the purchaser"

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regard to the liability of the purchaser to only six years' arrears, or to what other possible extent he might be compelled to submit, the case of *Cox v. Dolman*, 2 De G. M. & G. 592; s. c. 17 Eng. Rep. 429, might show.]

*Bacon*, and *Younge*, for the respondents, were not called upon.

KNIGHT BRUCE, L. J. I do not attribute any wrong intention to the plaintiff. The conditions of sale do not state any thing that is untrue, yet the ninth condition ought to have been otherwise: it ought to have stated that the annuity was granted for the lives of four persons and the life of the longest liver of them, and it ought also to have stated that the annuity was not granted by a person entitled in possession. Whether *Cox v. Dolman* has, or has not any important bearing on the case, it is no light matter that on the decease of the tenant for life heavy arrears might be raised, or be sought to be raised, under the term limited for securing the annuity. It appears that two of the four lives were subsisting at the date of the contract, and it is not shown that they have determined, or that the term is not subsisting. The case is not one for specific performance. The appeal will be dismissed, without costs.

TURNER, L. J. This case turns upon two points. First, the effect of the representation that the annuity was granted for the life of George Morris; secondly, the effect to be given to the condition, that certain evidence should be conclusive evidence that the annuity had determined. As to the first point, if an annuity is mentioned to a purchaser as "a life annuity granted to George Morris," the purchaser cannot collect from that that the annuity was granted to George Morris for four lives. It is the duty of a vendor to make his conditions clear, for he has full knowledge of the circumstances relating to the title of the estate he is selling. It is said, however, that the condition in this case is so worded as to put the purchaser on inquiry, as was held in the cases where a leasehold estate was stated to be renewable on payment of a small fine, and where an advowson was sold with a representation that there was a prospect of a speedy vacancy. But those expressions were vague, and could not lead a purchaser to any definite conclusion. Here, terms are used calculated to lead the purchaser to believe that the annuity was only for one life. The case is not one for specific performance. As to the second point, I am not so clear. I think there is considerable doubt whether the purchaser did not contract to buy the estate subject to the risk whether the annuity was subsisting or not. But I am disposed to think that the true construction of the contract is, that the purchaser was not to be entitled to require the vendor to fur-

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an expression which could hardly be considered doubtful, was allowed, contrary to the clear intention, to raise an objection upon an earlier lease than that sold, and on that ground to escape from the contract."

nish further evidence that the annuity had determined, but that he was left at liberty to prove that it was subsisting, and that he thus bought on the footing that the annuity was not subsisting.

Their lordships, upon requiring the production of the enrolment of the annuity for the information of the court, directed that application should be made at the enrolment office, Chancery lane, for the document; but the clerk of enrolments, Mr. Wright, attended and informed the court that the record in question being above fifteen years old, had been removed, according to practice, to the depository in the Rolls Chapel. Their lordships then directed a similar application to be made at that place. Mr. Maples, the solicitor for the appellant, accordingly applied at the Rolls Chapel Office, and stated that he was informed there that a fee of two guineas was chargeable according to the scale of fees settled by the late Master of the Rolls, Lord Langdale, pursuant to the statute 1 & 2 Vict. c. 94, s. 9. The solicitor said he had given his undertaking to pay this amount, whereupon a clerk attended the court with the record in question. At the conclusion of the hearing of the appeal, Mr. Maples asked for the directions of the court as to the payment of the fee.

**KNIGHT BRUCE, L. J.** I have not the words of this act of parliament before me, but I have no hesitation whatever in stating my opinion to be, that this fee ought not to be paid. The document has not been produced at all, in the ordinary acceptation of that term. The Court of Chancery has required to see one of its own records, in the custody of one of its own officers. Neither appellant nor respondent has required to see the memorial. If either had so required, it must have been produced on the payment of this fee. It has, however, only been brought from the depository of the court, by an officer of the court, for the information of the court from among its own records. The fee ought not to be paid.

**TURNER, L. J.** Whatever may be the words of the act of parliament, it is quite plain that payment of this fee ought not, on this occasion, to have been asked for, and, of course, ought not to be paid.<sup>1</sup>

<sup>1</sup> Upon inquiry at the Rolls Chapel Office, it appears by the old practice, before the passing of the statute 1 & 2 Vict. c. 94, entitled "An act for keeping safely the Public Records," whenever a record was required to be produced from the Tower of London, the chapel house of Westminster, the rolls chapel, or any of the very numerous depositories of such documents, the production was obtained upon an order of this or any other of the superior courts, and the payment of a fee, but it does not appear whether the fee was of any uniform stated amount. The 9th section, however, of the above mentioned act authorizes the Master of the Rolls to make rules for the custody of the records, and "to fix the amount of fees (if any) which he shall think proper to be paid for the use of the records, calendars, catalogues and indexes in his custody." A rule of the Master of the Rolls for the time being is, by section 1, of that statute, made keeper of all the public records of the kingdom. Lord Langdale, pursuant to this authority, on the 17th of July, 1840, issued from the Rolls House as well a set of "rules and regulations for the management of the Public Record Office," as also a "table of fees to be paid for the use of the records, calendars, and indexes, and for copies of records."

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Hill v. The Great Northern Railway Co.

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## HILL v. THE GREAT NORTHERN RAILWAY COMPANY.

March 15, 1854.

*Company, Purchase by— Notice to puisne Incumbrancer — Purchase from prior Incumbrancer.*

An annuitant having power of entry and distress, to secure his annuity charged upon certain leasehold houses, was served with notice by a railway company of their intention to buy. The company subsequently purchased the property from a prior mortgagee, who had a power of sale. The annuitant filed a bill, not containing any allegations of fraud, or other improper conduct on the part of the company in their purchase from the first incumbrancer, praying payment of the annuity and all arrears, or of the amount proper for the redemption of the annuity:—

*Held*, reversing the decision of one of the Vice-Chancellors, that the plaintiff was not entitled, on such a bill, to the relief he asked, and it was dismissed.

THE facts of this case, which was an appeal from a decree of Vice-Chancellor Kindersley, are reported 23 Eng. Rep. 565. The arguments were the same as those used in the court below. The defendants were the appellants, and the appeal was from the whole decree.

*Elmsley and Younge*, in support of the decree of Vice-Chancellor Kindersley.

*Rolt and Goren*, for the company.

Knight Bruce, L. J. The bill in this case, when before the Vice-Chancellor, was treated by the bar, and, accordingly, his Honor heard and disposed of it, as if it had been a bill for the specific performance of a contract expressed or implied for the purchase of the property; or, unless that be mere repetition, to compel a railway company to purchase land, for the taking of which they had given notice to treat. His Honor's decree proceeds on that view of the bill; and I desire to be understood as giving no opinion whatever as to that decree, founded as it is on such an hypothesis. The same view of the bill has been presented here by the bar, and the argument had proceeded far—perhaps too far—and at considerable length, before it occurred to the court that the bill is not of that description. The bill is not

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at the above-mentioned record offices and repositories," (one of those being the Rolls Chapel;) and among the items in the schedule of charges is the following: "For attendance at the bar of the House of Lords, or elsewhere, for the purpose of producing records, (including the production thereof,) or for giving evidence upon the records, per diem 2l. 2s." It was upon the authority of this table of fees that the two guineas were demanded; but it is stated at the Rolls Chapel Office that if the solicitor who required the production of the enrolment in the above reported case had obtained a direction from their lordships, that it was to be produced without fee, that direction would have been at once and without any hesitation complied with.

For this information the reporter is obliged to Mr. Thomas Edlyne Tomlins, solicitor and record agent.

*In re Beavan.*

one for the specific performance of a contract expressed or implied, but is a bill by an equitable incumbrancer, alleging that a prior incumbrancer, whose incumbrance had deprived him of the legal estate, having been paid off, had so dealt with the legal estate as to deprive him of it; and that a railway company, who at one time gave notice to the plaintiff of their intention to treat with him for the taking of his interest in the land, but which notice the company has not acted upon, has taken possession of the land. If there had been nothing more in the matter, the plaintiff would doubtless have had a right to have the impediment arising from the legal estate removed out of the way, the only objection to such relief being granted being possibly that the legal estate may be outstanding in some person not a party to the suit, or before the court. The bill, however, is met by the company with an allegation that they have bought the property under a paramount title, so as wholly to destroy the plaintiff's right as against the land, and to reduce that right to one merely against the money in the hands of the party of whom the railway company bought. The answer and evidence fully bear out that defence; and, if the plaintiff had had any reasonable hope of meeting that case, his course would have been to have amended his bill by putting in issue the sale by the prior incumbrancer to the company, and stating that it was a fraudulent and improper one. That has not, however, been done: and, as the bill cannot be maintained in its present form, it must be dismissed; but, considering the course which has been adopted by the bar, both in the court below, and until a late period of the argument in this court, it will be dismissed without costs.

TURNER, L. J. I am entirely of the same opinion, and the appeal must be allowed, the bill being dismissed; but, for the reasons given by my learned brother, without costs.

*In re BEAVAN.*

February 24, 1854.

*Receipt Stamps — Counsel's Fees — Lunacy.*

It is not necessary to affix the penny receipt stamp on a brief where counsel signs his name, acknowledging the payment of the fee.

*Wright* said he was instructed to ask the opinion of their lordships on the following point: by an order made in this lunacy, dated the 2d of August, 1853, taxation was directed of certain bills of costs; among the items were fees to counsel, and upon the production of the brief with counsel's name indorsed under the amount of fees, which is the usual mode of acknowledging payment of such fees, the taxing officer, Mr. Joseph Parkes, declined to allow those items,

*In re Keogh.*

unless to each signature a penny stamp were affixed, on the ground that, by the statute for amending the stamp duties, 16 & 17 Vict. c. 59, the words of the 1st section and the schedule are positive as to the payment of the penny stamp for "receipt or discharge given for or upon the payment of money amounting to 2*l.* or upwards."

KNIGHT BRUCE, L. J. Had I been asked what ought to be done, I should have said these items of fees should have been allowed without the stamp; and being now asked, I have no hesitation in directing them to be allowed without stamps.

TURNER, L. J. I quite concur in that view.

*Roll.* Several queen's counsel have been applied to to put their initials across stamps, but they have all invariably refused to do so.

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*In re* KEOGH'S ESTATE.

March 16, 1854.

*Incumbered Estates Act—Process in England.*

The commissioners, under the statute 12 & 13 Vict. c. 77, (Incumbered Estates Act,) made an order in Ireland against a party for payment of money, or in default for commitment. The party was served with, but disobeyed, the order, and removed into England, out of the jurisdiction of the Irish court. Application was made, under the provisions of the same statute, to the Court of Chancery in England, to have the order enrolled, and the same being permitted, that court made an order at once, unconditionally, for an attachment.

In this matter of the estate of J. H. Keogh, deceased,

*Borrett* applied *ex parte* for an order, directing that process by attachment and committal should issue immediately against Mr. R. A. Mole and Annette Garotin, his wife, against whom two orders had been made by the commissioners under the Incumbered Estates (Ireland) Act, 12 & 13 Vict. c. 77, directing that they should pay a sum of 400*l.* within a fortnight, or in default should stand committed. The learned counsel stated that the parties had evaded obedience by withdrawing to England, out of the jurisdiction of the commissioners' court; and that, by the 14th section of the Incumbered Estates Act it is enacted, "That every order made by the commissioners under the act, a copy whereof shall be certified under their seal to the high court of chancery in England, may be enrolled in like manner and enforced by the like process as an order for payment or for accounting for money made by the high court of chancery in Ireland, a copy whereof, as exemplified and certified to the said court of chancery in England under the great seal of Ireland, may

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*In re Keogh.*

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be enrolled and enforced under an act passed in the 41st year of the reign of king George the Third, intituled 'An act for the more speedy and effectual recovery of debts due to his Majesty, his heirs and successors, in right of the crown of the United Kingdom of Great Britain and Ireland, and for the better administration of justice within the same:'" and also, that by the statute 41 Geo. 3, c. 90, s. 6, it is enacted, "That in all cases where in any suit between party and party, any decree shall be pronounced, or any order made for payment, or for accounting for money, by the high court of chancery in that part of the United Kingdom called Ireland, the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal of Ireland for the time being respectively, shall, upon application made to him or them respectively, cause a copy of such order or decree to be exemplified and certified to the court of chancery in that part of the United Kingdom called England, under the great seal of Ireland; and the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal of England, shall forthwith cause such order or decree, when it shall be presented to them respectively so exemplified, to be enrolled in the rolls of the high court of chancery in England, and shall cause process of attachment and committal to issue against the person of the party against whom such order or decree shall have been made respectively, in order to enforce obedience to and performance of the same, as fully and effectually, to all intents and purposes, as if such order or decree had been originally pronounced in the said court of chancery in England." The learned counsel further stated, that, as directed by these statutes, the two orders for payment issued by the commissioners had been duly enrolled in the court of chancery in England, and thereupon application was made to the proper officer for the issue of an attachment; but he refused compliance, alleging as a ground of objection, that the words of the statute, 41 Geo. 3, c. 90, s. 6, relating expressly to "any suit between party and party," precluded the court from issuing process in a matter or proceeding upon petition, the latter form being the only form in which the commissioners of incumbered estates were authorized to conduct their proceedings. He submitted that, upon the true construction of the section, the court would see that the order could be made "in a matter" as well as in a suit, for the 5th section of the same act relating to the enforcing of English orders in Ireland, the authority conferred was as to suits, and also as "to matters or proceedings by petition." He also stated that the common practice was to issue a writ *nisi*; but he submitted that the proceedings in the commissioners' court were analogous to the proceedings in a suit, and that the order, although entitled in a matter, should be treated for the purpose asked as if it were made in a suit between party and party; otherwise, the parties on being served with the writ *nisi* might again evade process by going out of the jurisdiction.

KNIGHT BRUCE, L. J. We think that the orders in question may be treated for the purposes of this process in England as if they had

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been made in Ireland in a suit between party and party; and, therefore, that an attachment may at once issue against Mr. Mole, the husband; but of course we can issue no such thing as an attachment against a married woman.

*Borrett.* The court in Ireland has made the orders against both husband and wife, and the court of chancery in that country has duly enrolled them, and the exemplification is certified to this court in the form prescribed by the legislature; so that all this court is asked is, to act on the orders so pronounced by a competent tribunal.

TURNER, L. J. Our duty here is to act upon that view of the law which we think to be right, and, of course, this court will issue no process of attachment for enforcing the payment of money by a married woman.

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DIPLOCK v. HAMMOND. THE GOVERNORS AND GUARDIANS OF THE POOR OF THE PARISH OF ST. MARY, NEWINGTON, v. HAMMOND.

May 31, 1854.

*Stamp — Order for Payment of a Sum out of a particular Fund — Interpleader.*

A, being entitled to the sum of 365*l.* payable to him by B, addressed the following note to B: "I hereby authorize you to pay to C the sum of 365*l.*, being the amount of my contract:—" —

*Held*, that this document did not require a stamp, as "an order for the payment of a sum of money out of a particular fund," &c., in the schedule to the 55 Geo. 3, c. 184.

B undertook to pay A the sum of 365*l.* at a particular time, and afterwards paid him 40*l.* on account. A then assigned the sum of 365*l.* alleged to be due to him from B both to C and D, and C and D claimed to be paid this sum from B. B filed a bill of interpleader against C and D, stating the payment of 40*l.*, and requiring them to interplead as to the 325*l.*: —

*Held*, that, on account of the difference of the two sums of 365*l.* and 325*l.*, interpleader did not lie.

C and D had a dispute as to a sum of money in the hands of B. On the 9th of April, C gave notice to B that a bill would be filed as to this sum, and filed a bill accordingly on the 16th of April. On the same day B filed a bill of interpleader: —

*Held*, that interpleader did not lie.

SOME time previous to October, 1852, the guardians of the poor of St. Mary's, Newington, entered into a contract with the defendant, Hammond, that they would pay him 365*l.* on the completion of certain works. In October, 1852, the guardians advanced 40*l.* to Hammond on account.

The plaintiff, Mr. Diplock, having advanced to Mr. Hammond a considerable sum of money, Mr. Hammond, on the 1st of February, 1853, signed the following document bearing the same date, and gave it to Mr. Diplock: —

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"To the Governors and Guardians of St. Mary, Newington.

"Gentlemen: I hereby authorize you to pay to Mr. John Diplock, of the Walworth Road, the sum of 365*l.*, being the amount of my contract at the new workhouse, Walworth Villa, Mr. Diplock having advanced me that sum."

This document was not stamped.

On the following day, the 2d of February, 1853, Mr. Diplock gave notice of this paper to the guardians.

On the 16th of February, Mr. Hammond gave notice to the guardians not to pay Mr. Diplock any thing on account of the sum due in respect of the contract.

On the 23d of February, Mr. Hammond assigned the money, due to him on the contract, to Mr. Booth.

A correspondence ensued between the solicitors of Mr. Diplock, Mr. Booth, and the guardians, respecting the conflicting claims of Booth and Diplock. On the 9th of April, the solicitor of Mr. Diplock gave notice to the solicitor of the guardians that, unless Mr. Diplock's claim was satisfied, he would file a bill in chancery.

On the 16th of April, Mr. Diplock filed a bill against Hammond, Booth, and the guardians, praying that the 365*l.* should be paid to him. On the same day, the guardians filed a bill of interpleader against Diplock, Booth, and Hammond, alleging that they had paid 40*l.*, part of the 365*l.*, to Hammond, and praying that Booth and Diplock might interplead as to the 325*l.*

Both causes now came on to be heard.

*Malins* and *Palmer*, for Mr. Diplock.

*Swanston* and *Collins*, for the guardians, cited *Crawford v. Fisher*, 1 Hare, 436.

*Craig* and *Welford*, for Booth, objected that the document of the 1st of February, 1853, came within the following description in the 55 Geo. 3, c. 184, schedule, part 1, Inland Bill: "The following instruments shall be deemed and taken to be inland bills, drafts or orders, for the payment of money within the intent and meaning of this schedule, namely, all bills, drafts, or orders, for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee or some person on his or her behalf;" and was void for want of a stamp. They cited: *Emly v. Collins*, 6 M. & S. 144; *Butts v. Swan*, 2 Brod. & Bing. 78; *Firbank v. Bell*, 1 B. & Ald. 36; *Braybrooke v. Meredith*, 13 Sim. 271; *Parsons v. Middleton*, 6 Hare, 261.

*Speed*, for Mr. Hammond.

*Malins*, in reply, referred to *Lett v. Morris*, 4 Sim. 607; *Jones v.*

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*Simpson*, 3 Dowl. & Ry. 545; *L'Estrange v. L'Estrange*, 13 Beav. 281; s. c. 1 Eng. Rep. 153; *Rodick v. Gandell*, 1 De G. M. & G. 763; s. c. 15 Eng. Rep. 22.

STUART, V. C. The first question is, whether the instrument of the 1st of February, 1853, is within the provisions of the Stamp Act, 55 Geo. 3, c. 184. The language of the act is perfectly clear. It requires a stamp on every instrument which is an order for the payment of any sum of money out of any particular fund. An instrument, which is an order for payment of part of a fund, is not an assignment, but an order for the payment of money. An order to pay or transfer the whole fund, is an equitable assignment, and is not such an instrument as the act describes. Here, the instrument directs the payment of the whole fund to be made to the plaintiff, and is clearly an equitable assignment. It is, therefore, in my opinion, not liable to a stamp as a bill or note. All the authorities which have been cited, are clearly against the validity of the objection.

Then comes the question with reference to the bill of interpleader. I am of opinion that the suit is clearly not sustainable as an interpleader suit. The meaning of interpleader is, that the holder of a fund, which is claimed by different individuals, shall not be exposed to harassing litigation; he himself claiming no interest in the fund, and the other persons claiming it not proceeding to litigation with a view to the settlement of their claims. It is so called because it is a bill by a stakeholder who cannot get the claimants to settle the question between themselves, and who, apprehending that he may be exposed to attack from one or the other of them, comes to this court to subject them to interpleader. If they were allowed to proceed against him separately, of course it would be vexatious. The first thing essential in interpleader is, that the plaintiff should be a mere stakeholder, and have no interest of his own in the fund. But here, the plaintiffs in interpleader say, that they have only 325*l.* in their hands, whereas they show me, by their own bill, that one of the defendants puts down the fund at 365*l.* This simple circumstance, that there is a question as to the amount of the fund, is fatal to the bill. The plaintiffs ask to interplead about 325*l.*, and then bring a question as to the amount of the fund. It is the invariable practice that, when there is any question raised by the plaintiffs as to the amount which is the subject of interpleader, such question prevents the rights of interpleader.

Another objection equally fatal is, that, according to the facts before me, the plaintiffs in interpleader had satisfactory information that what they sought was about to take place. It is here abundantly plain that the rival claimants were about to settle this question between themselves by having recourse to this court; for, on the 9th of April, Mr. Diplock's solicitor wrote to the solicitors of the guardians, saying that, unless his demands were complied with immediately, Mr. Diplock would take proceedings in chancery to establish his claim, and the bill was filed on the 16th of April. Shortly after, on the same day, the bill of interpleader was filed, although the board

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of guardians knew that the several claimants were about to litigate the question among themselves. This bill must, therefore, be dismissed, with costs.

There remains the case of *Diplock v. Hammond*, which is a simple case of an equitable assignment of a debt in the hands of an assignee with notice to the debtor, prior in date to another assignment.

I shall, therefore, declare that the plaintiff, Diplock, has a valid, equitable assignment of the debt, and that he has the first security on it, and direct accounts to be taken as between Hammond and the board of guardians, and as between Hammond and Diplock, and reserve the costs of all parties in *Diplock v. Hammond*.

From this decree, the defendant, Booth, appealed upon the question of the stamp.

*Craig and Welford*, were for the appeal.

*Malins and Palmer*, for the plaintiffs, and

*Swanston and Collins*, for the guardians, were not called upon.

KNIGHT BRUCE, L. J. The governors and guardians of the parish of St. Mary, Newington, owed Mr. Hammond a debt. The plaintiff, Mr. Diplock, asserts that the creditor, Mr. Hammond, assigned that debt in equity, for value, to him, and that it is an assignment preferable to the title of the defendant, Mr. Booth, under an assignment of the same debt from the same creditor. The truth of this would be indisputable if the Stamp Act were out of the question; but for that, there could be no doubt or difficulty or reasonable question whatever. The paper signed by Mr. Hammond, has been read, and it was served on the debtors. With regard to the claim of Mr. Booth, the assignment to him was subsequent to that to Mr. Diplock, and it was not served on the governors and guardians, the debtors, until after the service on them of the other assignment. The case would be, therefore, undefended if the stamp laws were out of the question. It is, however, said that by reason of these the plaintiff's case fails. It is put thus: that either the stamp laws render that not an assignment, which but for them would be an assignment, or that on certain instruments double stamps are required. If this be the law, it must, of course, be submitted to; but I do not think it is in such a discreditable position. As to the first ground, it is hardly disputable, and, I should have been almost ashamed if the law had authorized the defence. But it is said, that the language of the instrument is such that it renders it necessary to have a double stamp placed on it: if the words had been, "I hereby assign to John Diplock," it would clearly have been an assignment; but it is said that the words, "I hereby authorize you to pay to Mr. John Diplock," turn the instrument into an order for payment of money, and make it require a stamp of its own. I think this a misinterpretation of the stamp laws, and that such interpretation of them would be harsh, oppressive, and

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irrational. There is nothing to render an assignment, to which the description of an order for payment of money may, to a certain extent, be applicable, liable, on that account, to an additional stamp. The petition of appeal must be dismissed, and I trust my learned brother will not object to its being dismissed with costs.

TURNER, L. J. As my learned brother agrees so entirely with the Vice-Chancellor, I shall not express any decided opinion on the case; but I do not see any sufficient reason for not saying that the act may be so read as that, if a particular instrument is to operate as an assignment it shall require a stamp of one kind, or if it is to operate as an order for the payment of money, then it shall require a stamp of another kind. I shall give no opinion on this; but I do not object to the bill being dismissed with costs.

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WOOD v. MIDGLEY.

February 28, 1854.

*Vendor and Purchaser — Statute of Frauds — Contract — Signature — Pleading — Speaking Demurrer.*

A party paid to an auctioneer, the agent for a proposed vendor, 50*l.* "as a deposit and part payment of 1,000*l.*" for the purchase of hereditaments, and received a receipt for the same, containing the words "the terms to be expressed in an agreement to be signed as soon as prepared." He had previously approved of the draft of the contract. At the time of taking the receipt, he agreed to sign the contract on the following morning. This he ultimately refused to do, and, by his solicitor, demanded back the 50*l.* The proposed vendor filed a bill for specific performance, to which a demurrer was put in setting up the statute of frauds as a defence, no agreement having been signed:—

*Held*, overruling a decision of one of the Vice-Chancellors, that the demurrer was a good defence to the bill.

*Held*, also, but in accordance with the Vice-Chancellor's view, that the demurrer stating "that it appears by the bill that neither the agreement which is alleged by the bill and of which the bill prays the specific performance, nor any memorandum or note thereof, was ever signed by this defendant, nor any other person lawfully authorized within the meaning of the statute," &c., was not a speaking demurrer.

*Held*, also, that the statute of frauds may be set up by demurrer as well as by plea.

THIS case came before the court upon demurrer.

The bill was filed by Mr. J. C. Wood and Mr. J. F. N. Daniel, owners of the "Ship and Camel" public-house, Bermondsey, a leasehold house. From the bill it appeared that the same had been offered for sale by auction and bought in, particulars and conditions of sale having been prepared. Messrs. Warlters, Lovejoy and Son, auctioneers, were the agents for Messrs. Wood and Daniel. Mr. Midgley went with Mr. Lovejoy to the house of Mr. Stephenson, the solicitor of Messrs. Wood and Daniel, and perused the lease under which the premises were held, and arranged with Mr. Lovejoy to buy for 1,000*l.*

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upon the terms of the conditions of sale, and Mr. Lovejoy agreed to sell. Both parties then directed the clerk of Mr. Stephenson to prepare the agreement, and agreed to remain at the office to sign the same. The clerk prepared the document, and when prepared the clerk read it over and both parties approved of it, and Mr. Midgley agreed to sign it, and to pay the stipulated deposit of 50*l*. He, however, stated his wish not to be obliged to remain until the agreement was copied for signature, and proposed to call the next morning to sign it, but he paid the 50*l*. to Mr. Lovejoy, receiving from him the following.

"Memorandum. Mr. Thomas Midgley has paid to me the sum of 50*l*. as a deposit and in part payment of 1,000*l*. for the purchase of the 'Ship and Camel' public-house at Dockhead, the terms to be expressed in an agreement to be signed as soon as prepared.

"WILLIAM LOVEJOY."

"5th July 1853."

On the following day, instead of calling to sign the agreement, the solicitors for Mr. Midgley addressed the following note to the auctioneers:—

"1, Anchor Terrace, Southwark, 6th of July, 1853.

"Dear Sirs: Mr. Midgley declines entering into any agreement for the purchase of the lease of the 'Ship and Camel' public-house at Dockhead. You will be pleased, therefore, to return us the 50*l*. he left with Mr. William Lovejoy yesterday.— We are, dear sirs, yours very truly,

"MARSON, DADLEY, and MARSON."

"Messrs. WARLTERS and LOVEJOY."

This demand not being complied with, Mr. Midgley threatened legal proceedings to recover back the deposit. Thereupon Messrs. Wood and Daniel filed their bill, which after setting forth the above facts, stated that the defendant "induced the said Mr. Lovejoy to agree to the defendant deferring his signature of the said agreement until the then following morning, and the said Mr. Lovejoy did so agree, in consideration of the defendant promising and agreeing to call upon the said Mr. Lovejoy on the following morning, and then sign the copy of the said writing or agreement, and, in fact, it was part of the contract or agreement for the said purchase entered into on the said 5th of July, that such contract should be put into writing, and should be signed by the defendant; and the same would, in fact, have been signed by the defendant on the said 5th of July before leaving the office of the said Mr. Stephenson, but for his agreeing, in manner aforesaid, to sign the same the next morning, and being accepted at once as the purchaser by the said Mr. Lovejoy, which was upon the faith only of the aforesaid promise." Then the bill, after setting out the memorandum, stated as follows: "The agreement referred to in the said memorandum was the fair copy intended and agreed to be made as hereinbefore mentioned of the said draft or writing, so prepared, agreed to and approved as aforesaid, and

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which fair copy the defendant so agreed to sign as aforesaid; and the deposit mentioned in the said memorandum was the deposit mentioned in the said draft or writing, and paid in pursuance thereof as aforesaid; and, in fact, the said memorandum expressed the terms of the contract so made and concluded between the defendant and the said Mr. Lovejoy, as agents of the plaintiffs as aforesaid." The bill prayed a specific performance of the agreement, and an injunction to restrain the action for the return of the deposit.

The defendant filed a demurrer as follows: "This defendant demurs in law to the said bill, and for cause of demurrer pleads that it appears by the bill that neither the agreement, which is alleged by the bill, and of which the bill prays the specific performance, nor any memorandum or note thereof, was ever signed by this defendant or any other person thereunto by the defendant lawfully authorized within the meaning of the act of parliament made and passed in the 29th year of his Majesty King Charles the Second, intituled 'An act for the prevention of frauds and perjuries;' and that the plaintiffs have not by their said bill made any case entitling them to relief in this honourable court, wherefore this defendant demurs to the said bill and to all the matters and things therein contained."

There was no allegation or charge in the bill that the non-signature of the agreement by the defendant was a fraudulent omission by, or contrivance of, Mr. Midgley.

Vice-Chancellor Stuart overruled the demurrer, with costs, and the defendant appealed.<sup>1</sup>

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<sup>1</sup> The judgment of the Vice-Chancellor was in the following words: "This is a case of great difficulty, and raises a question that has often perplexed this court as to the statute of frauds, whether the terms of the statute should be strictly enforced, or whether there are such circumstances in the case that fraud would rather be promoted than prevented by allowing the defendant to avail himself of the statute, to evade the performance of the agreement clearly proved and perfect in all its terms. It is quite plain, unless the terms of the agreement are defined with certainty, and clearly proved, neither purchaser nor vendor can maintain a suit for specific performance. The statements in this bill leave no doubt as to the terms of the agreement. There is no doubt that a complete agreement was made, which, but for the statute of frauds, the court would decree to be specifically performed. It has been said, that, according to the case of *Maxwell v. Mountacute*, if the terms of the agreement having been settled and reduced into writing, the signature by the defendant was only postponed for his convenience or by his contrivance, the defendant cannot successfully insist on the statute of frauds. Here, the defendant not only had the signature by himself postponed for his own convenience; but contrived, by paying the 50*l.* as a deposit, to get a receipt signed in such a way as to bind the plaintiffs. There is no doubt, on the averments in the bill, that the agreements would have been signed at the time, but for the postponement procured by the defendant. It does not appear that the object of the postponement of the signature was to afford to the defendant a *locus penitentiae*, for he wanted none; but the postponement took place, and the money was agreed to be taken, solely to save the defendant the inconvenience of waiting at that time. The defendant wished to have a memorandum that he had paid the money; the memorandum was, therefore, drawn up by the clerk of the plaintiff's solicitor upon instructions from, and in the presence of, the defendant and Lovejoy, the plaintiffs' auctioneer, and it was signed by Lovejoy, the auctioneer. The object of this arrangement for the convenience of the defendant is admitted to have been that the defendant might at once be accepted as purchaser, and might have evidence that he (the defendant) had so far

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*Malins* and *Cairns*, in support of the demurrer, rested the case on the fact, that no agreement or any memorandum thereof was alleged by the bill to have been signed by the defendant sought to be charged therewith, as required by the 4th section of the statute of frauds; and they cited: *Hollis v. Whiteing*, 1 Vern. 151; *Hollis v. Edwards*, Ibid. 159; *Whitchurch v. Bevis*, 2 B. C. C. 559, 564; *Buckmaster v. Harrop*, 7 Ves. 341.

*Lewis*, in support of the bill, argued that the defendant had mistaken his course in putting in a demurrer at all, as it was clear the only proper mode of setting up the statute of frauds was by plea, — although, had the defence been upon the statute of limitations, a demurrer might have held; and the very form of demurrer was sufficient to show that it could not be supported when it sought to give the defendant the benefit of that statute. The averment in this demurrer was, "It appears by the bill that neither the agreement which is alleged by the bill, and of which the bill prays the specific performance, nor any memorandum or note thereof, was ever signed by his defendant, or by any other person thereunto by the defendant lawfully authorized." This was nothing less than the allegation of a fact which did not appear by the bill, for it was quite consistent with every fact appearing on the face of the bill that there might be a note or memorandum in existence so signed by the defendant or his lawfully authorized agent, and, therefore, upon prin-

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complied with the terms of the agreement. No doubt this memorandum is liable to the observations made by counsel, that it refers to a document the terms of which were to be signed as soon as prepared. It is said, with great force, that that reference to an agreement not prepared and not signed, is a reference to nothing which can excuse a non-compliance with the provisions of the Statute of Frauds. But the memorandum to be prepared and signed was only the fair copy of the draft as settled and agreed to. The demurrer admits that this draft contained all the terms of the agreement, and when copied was to be signed. Sir William Grant, in *Blagden v. Bradbear*, in the 12th volume of Vesey, p. 471, says: "The proposition that the auctioneer's receipt may be a note or memorandum of an agreement within the statute, is not denied; but for that purpose the receipt must contain in itself, or by reference to something else must show what the agreement is." The soundness of that doctrine I have not heard questioned upon any occasion. In the present case, there is no doubt that the receipt signed by the auctioneer refers to an agreement, the terms of which are certain. The agreement, which was to be signed as soon as prepared, that is, as soon as copied, was, in fact, only a fair transcription of the draft, and there is no dispute whatever that the draft, consisting of the conditions of sale as altered in writing, contained the exact terms of the agreement. I apprehend that this case is within the decision in *Blagden v. Bradbear*, depending upon the rule of common sense, that that is certain, which by evidence can be rendered certain. I must consider that this receipt is a note or memorandum which refers to that which shows what the agreement was. If so, there is no uncertainty whatever; the terms were agreed upon, and were certain, and the terms of the memorandum to be prepared and reduced into writing were also certain, and in a documentary shape. I am fully aware that in arriving at this conclusion I carry to its fullest extent the principle laid down by Sir William Grant, in *Blagden v. Bradbear*. The auctioneer employed by the vendor who signs a receipt for payment of the deposit, is treated as the agent for both parties, and if the receipt in itself, or by reference to something else, enables the court to ascertain with certainty what the agreement really is, that has been held a sufficient compliance with the statute; that, in fact, is the present case, and I must overrule the demurrer with costs."

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ciple and authority, this must be held to be a speaking demurrer, and consequently bad.<sup>1</sup> On this point, and on the general question, he cited: *Mitford on Pleading*, 3d ed. 218; *Edsell v. Buchanan*, 4 B. C. C. 254; *Mussell v. Cook*, Prec. in Chanc. 531; *Walker v. Walker*, 2 Atk. 98; *Muckleston v. Brown*, 6 Ves. 52; *Spurrier v. Fitzgerald*, Ibid. 548; *Fowle v. Freeman*, 9 Ibid. 351; *Blagden Bradbear*, 12 Ibid. 466; *Fielder v. Higginson*, 3 V. & B. 142; *Western v. Russell*, Ibid. 187; *Dawson v. Ellis*, 1 J. & W. 524; *Gibbins v. North Eastern Metropolitan Asylum District*, 11 Beav. 1; *Hammersley v. De Biel*, 12 Cl. & F. 45; *Leroux v. Brown*, 22 Law J. Rep. (N. S.) C. P. 1; s. c. 14 Eng. Rep. 247.

The court would not lend itself to the support of a defence encouraging fraud, which it would be doing if it allowed the demurrer, for the allegations in the bill quite conclusively showed that the non-performance of the promise made to go on the following morning and sign the agreement was fraudulent. The bill showed that it was a reliance on that promise which induced the agent for the vendors to sign the memorandum binding his principals, and enforceable against them, and, that being so, Lord Macclesfield's observations in the case of *Maxwell v. Mountacute*, 3 Prec. in Chanc. 526;—where, speaking of a parol agreement, he said: "If there were any agreement for reducing the same into writing, and that is prevented by the fraud and practice of the other party, this court, will, in such case, give relief"—applied. The present case came, therefore, clearly within that principle, and on every ground, whether of form or substance, of pleading or merits, the demurrer ought to be overruled and the appeal dismissed. Independently of all these considerations, it might be very fairly argued that the signature of the solicitors of Mr. Midgley to the letter by which they signified that their client declined to enter into any agreement for the purchase of the premises was, in contemplation of law, coupled with what had previously taken place between Mr. Midgley and the auctioneer, a complete recognition of and signature to the contract by the solicitors, as agents for Mr. Midgley, and binding upon him, although from the previous points it did not become necessary to rely much upon such an argument.

TURNER, L. J. This is a case in which, as the Vice-Chancellor has observed, different minds may arrive at different conclusions. My mind has arrived at a conclusion entirely different from that at which his Honor arrived. The question comes on by demurrer. Three points are raised in the argument: first, it is said, that this is a speaking demurrer; secondly, that the nature of the case prevents

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<sup>1</sup> The Vice-Chancellor, on the question of form, decided as follows: "The objection to the form of the demurrer cannot be sustained. The reference to the contents of the bill is not an averment of any new fact necessary to support the demurrer. A speaking demurrer avers some fact, as necessary to support the demurrer which does not appear on the face of the bill, and is, therefore, a bad demurrer. Where, as in this case, no new fact is alleged, the expressions of objections are mere surplusage, and, as held by Sir John Leach, do not vitiate the demurrer."

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the defence being set up by demurrer; and thirdly, on the merits, that the agreement has been signed by the party to be charged. With reference to the first point, as to this being a speaking demurrer, the office of a demurrer is to state on the part of the defendant that the plaintiff has not made a sufficient case in his bill for equitable relief; and it is no part of a demurrer to bring forward any facts not appearing on the face of the bill. If this demurrer contained allegations of facts not appearing in the bill, it would be liable to the objections taken by the plaintiffs; but it alleges only what appears on the bill. The demurrer raises no issue of fact; but what it does, appears by the bill. It is perfectly clear that it is not a speaking demurrer. It was said, that the statute of frauds could not be made available as a defence by means of a demurrer, upon the ground that the statute of frauds does not destroy the remedy where the agreement is admitted, as it is said it must be by demurrer; but the agreement, which must, according to the statute, be admitted, must be one signed by the party to be charged; if, therefore, the agreement alleged by the bill does not come within that description, the admission of it by the demurrer will be of no avail to the plaintiff. An attempt was made to draw a distinction between the cases where a defence is set up by demurrer, of the statute of frauds, and one of the statute of limitations; but there is in reality no distinction between them; in every case it rests upon the plaintiff to state a case entitling him to relief. It is clear, therefore, that this defence may be taken by demurrer, and that the plaintiffs ought to have alleged facts which would take the case out of the statute. With regard to the merits of the case, it has been contended that the conduct of Midgley in not attending to sign the agreement amounted to a fraud on the plaintiffs, and that if guilty of fraud, he ought not to be allowed to take advantage of the statute; or, according to the ordinary expression, "the statute of frauds should not be allowed to cover a 'fraud.'" That is true; but the question is whether there is a case of fraud alleged upon the bill; it clearly is not. It is not alleged that Midgley, by fraud, prevented the agreement from being reduced into writing. Such a case is not brought forward by the bill. The defendant has a perfect right to say: "I will sign when the agreement is prepared;" and not having signed it, he has an equal right to say: "I will not be bound." The memorandum acknowledging the receipt of the 50*l.* says that it is a deposit on a purchase, "the terms to be expressed in an agreement to be signed as soon as prepared;" and before the terms are expressed, Mr. Midgley withdraws from the affair, as he had a perfect right to do. Another argument made use of was, that the letter in which Mr. Midgley, by his solicitor, says he will not enter into any agreement for the purchase, is, in conjunction with what passed between the parties, a recognition, completion, and signature of the contract by the agent: an argument which the court cannot for a moment recognize. The appeal must be allowed.

KNIGHT BRUCE, L. J. I am entirely of the same opinion. The plaintiffs must pay the costs of the proceedings before the Vice-Chancellor. The order of the court below is reversed.

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Hicks v. Sallitt.

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## HICKS v. SALLITT.

February 21, and November 21 and 22, and December 5 and 6, 1853, and January 24, 1854.

*Will, Construction of — Devise of Manor — Copyholds — Adverse Possession — Infancy — Account of Back Rents.*

By the marriage settlement of Mrs. B., the manor of W. with the appurtenances, and other real estate, were conveyed to trustees, upon such trusts as Mrs. B., should, by will, appoint, and in default upon the trusts therein mentioned. The trustees, under the powers of the deed, purchased lands, copyhold of the manor of W. which were surrendered to them accordingly; and these lands were, in the lifetime of Mrs. B., thrown into one farm with other lands, not part of the manor, and let together under one demise. Mrs. B. died in 1813, having by her will appointed all her manor of W. to R. H. for life, with remainder to his first and other sons in tail male, and having appointed the residue of her real estate to trustees upon trust to sell. In 1814, the trustees of the will, presuming the purchased copyholds to have passed under the devise of the residue, sold them to R. B., who continued in possession until his death in 1835; and in 1837, R. B.'s devisees sold them to the defendant S. R. H. the tenant for life, died in 1828, leaving two infant sons, R. H., who died in 1831, a minor, and W. H. H., the plaintiff. In October, 1849, W. H. H. attained his majority, and, in December, 1850, filed his bill against S. and others, claiming the purchased copyholds as being included in the devise of the manor of W.:—

*Held*, upon appeal, affirming the decision of the court below, that, there being nothing in the will absolutely inconsistent with such a construction, the word "manor" must have its legal effect, and S. was decreed to reconvey to the plaintiff.

*Held*, also, that the purchasers, having notice of the will, could not be held to have had a *bonâ fide* adverse possession; and that the plaintiff, being an infant at the time his title accrued, and having asserted his rights without laches, was entitled to an account of the rents and profits from the time his title accrued.

For the purpose of construing a testamentary appointment, the court is entitled to look at the instrument creating the power, the two constituting at law but one instrument.

By an indenture, dated the 14th of May, 1796, and made between Benjamin Barker of the first part, Elizabeth Hicks, widow, of the second part, the Rev. John F. Franklin of the third part, and John Franklin and Robert Harvey of the fourth part, (being the settlement executed upon the marriage of B. Barker and Elizabeth Hicks,) Elizabeth Hicks released to John F. Franklin and his heirs all that manor of Watton Hall, in Watton, &c., and the site of the said manor, and the demesne lands, waters, pools, fishings, heaths, marshes, moors, wastes, plantations, wood grounds, commons, common of pasture, quitrents, services, &c., and appurtenances whatsoever to the said manor belonging; and also the parsonage, or impropriate rectory of Watton aforesaid, and all and singular glebe lands, tithes, &c., to the said parsonage belonging, and certain other real estates in the said indenture described, to the use of Elizabeth Hicks until the marriage; and from and after the said marriage, as to certain parcels thereof, to the use of John Franklin and Robert Harvey, for the term of 500 years; and subject thereto, as to the whole of the hereditaments, to the use of the said John F. Franklin and his heirs; upon the trusts thereafter declared: Elizabeth Hicks also assigned to John F. Franklin certain leasehold property; and it was declared that John F. Franklin should hold the said freehold and leasehold premises, after the

solemnization of the marriage, upon such trusts, and with, under, and subject to such powers as Elizabeth Hicks, during the joint lives of herself and B. Barker, should by deed or will appoint; and in default of such appointment, to the separate use of Elizabeth Hicks. B. Barker by the same indenture covenanted that after the marriage he and Elizabeth Hicks would surrender to the use of J. F. Franklin all the copyhold estates of which Elizabeth Hicks was seised, to be held by him upon trusts corresponding with the trusts declared of the freehold estate. Power was by another indenture of even date given to John F. Franklin, with the consent of Elizabeth Hicks, to convert certain personal estate included in the settlement, and to invest the produce in the purchase of lands of inheritance, to be subject to the like trusts as were declared of the freehold estates; and power was given to Elizabeth Hicks to appoint a new trustee, or new trustees, in the place of John F. Franklin. The marriage took effect; in 1802 John F. Franklin died; and by an indenture of the 28th of October, 1803, Philip R. Taylor and Edward H. Grigson were appointed trustees in his place, and all the trust estates and premises were conveyed and assigned to them accordingly.

By an act of parliament passed in the 41st year of Geo. 3, intituled "An act for dividing, allotting, and inclosing the open, or common fields, commons, and waste lands within the several parishes of Watton and Carbrooke," it was enacted that the commissioners therein named should assign, set out, and allot unto and for the respective lord or lords of the soil of the said commons and waste lands, or their respective assigns, such part of the said lands and grounds by the said act directed to be divided and allotted within the said parishes of Watton and Carbrooke respectively, as, in their judgment, should be a full recompense and compensation for his, or their right, or rights in and to the soil of the said commons and waste lands respectively; and it was enacted, that all allotments made under the act in respect of any copyhold lands should be deemed and taken to be of copyhold tenure.

On the 24th of December, 1803, the commissioners made their award, and thereby allotted to P. R. Taylor and E. H. Grigson, as lords of the manor of Watton Hall, as a compensation for their interest in the soil of the said commons, &c., a certain plot of land, consisting of about twelve acres.

By an indenture, dated the 6th of April, 1804, Philip R. Taylor and Edward H. Grigson, out of moneys subject to the trusts of Mrs. Barker's settlement, purchased of the devisees of Thomas Scott the elder, three parcels of land copyhold of the manor of Watton Hall. On the 4th of May, 1804, Mrs. Barker's trustees, out of the trust moneys, purchased of another Thomas Scott, and Sarah his wife, a certain piece of land copyhold of the manor of Watton Hall, and Thomas Scott, and Sarah his wife, on the same day surrendered the last-mentioned copyhold lands to the trustees upon the trusts of the settlement. On the 28th of August, 1804, the devisees of Thomas Scott the elder surrendered the copyhold lands comprised in the first purchase to the use of the trustees of Mrs. Barker's settlement. In 1808, Philip R.

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Taylor died, and by a deed of the 9th of June, 1809, William Mason was substituted as a trustee in his place; and all the trust estates and premises were then vested in Edward H. Grigson and W. Mason, upon the trusts of Mrs. Barker's settlement. Shortly after the acquisition of these five allotments of copyhold land by the trustees, the fences were destroyed, and they were thrown into a farm called Neaton Farm, which was demised to Robert Buxton, under one lease, for a term of years.

Mrs. Barker, by her will, dated the 4th of December, 1807, in execution of the power reserved to her by the settlement deed, appointed "all that the manor of Watton Hall, in Watton, together with all courts leet, courts baron, fines, quitrents, and profits of courts, and all other the rights, members, privileges, advantages, and appurtenances to the said manor or lordship belonging, or appertaining," together with a farm called Wick Farm, and her capital messuage, or mansion-house, (the bulk of which was comprised in the manor,) subject as therein mentioned, to the use of John Raby Hicks, (the father of the plaintiff,) for his life, with remainder to the use of the first son of the said J. R. Hicks in tail male; and on failure of such issue, to the use of the second, third, and every other son and sons of the said J. R. Hicks successively, and their respective issue male; and, by her said will, the testatrix appointed all the residue and remainder of her real estate, situate at Watton aforesaid, and the towns next adjacent, unto R. Harvey and John Hebgin, their heirs and assigns, upon trusts for sale; and directed that they should stand possessed of the proceeds upon the trusts mentioned in her will. The testatrix afterwards made three several codicils to her said will, the purport and effect of which are noticed in the judgment.

Mrs. Barker died on the 24th of July, 1813, leaving her husband Benjamin Barker, surviving her.

In January, 1815, a copyhold recovery, for the purpose of confirming the title, was suffered of the lands purchased by the trustees of the settlement from Charles L. Scott and Thomas Edward Scott, the devisee of Thomas Scott the elder, being the lands comprised in the deed of the 6th of April, 1804.

On the 4th of August, 1814, the trustees of Mrs. Barker's will put up for sale the residuary real estate of Mrs. Barker, in lots; and lot 1 comprised Neaton Farm, together with five allotments of land, being the lands respectively allotted to and purchased by the trustees of Mrs. Barker's settlement, and which were then presumed to form part of the testatrix's residuary real estate. Robert Buxton became the purchaser of lot 1, and the property was conveyed to him by the trustees. Robert Buxton continued in possession till his death, which took place in 1835, and, by his will, devised the same to trustees in trust to sell.

In 1837, the trustees contracted to sell the said five pieces of land to the defendant Sallitt, and the same were afterwards conveyed to him accordingly.

John Raby Hicks, the father of the plaintiff, died on the 27th of

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November, 1828, leaving two sons surviving him, namely, J. R. Hicks, and the plaintiff William Henry Hicks.

J. R. Hicks, the son, died on the 1st of June, 1831, at the age of four years, leaving his brother, the plaintiff, surviving him, who attained his age of twenty-one years in October, 1849, and shortly afterwards barred the entail in the devised estates.

On the 12th of December, 1850, William Henry Hicks filed his bill, claiming that the said five pieces of land, so sold and conveyed to Buxton by the trustees of Mrs. Barker's will, were comprised in and passed by the devise of the manor of Watton Hall. The bill prayed a declaration that the conveyance by the trustees to Buxton was a breach of trust; and for an account of the rents and profits of the lands from the 1st of June, 1831; and that the defendant Sallitt might be decreed to convey to the plaintiff the said soil allotment, and also the said three several pieces of land comprised in the surrender of the 12th of January, 1815, and the piece of land comprised in the surrender of the 4th of May, 1804; and to deliver up possession of the said five pieces of land to the plaintiff; and for an injunction and a receiver.

The cause came on for hearing before Wood, V. C., who, on the 21st of February, 1853, delivered the following judgment.

WOOD, V. C. In this case, the plaintiff claims as devisee under the testamentary appointment made by Mrs. Barker, under the power contained in her marriage settlement, dated the 14th of May, 1796, by which certain property, comprising, amongst other things, the manor of Watton Hall, was limited, after the marriage, in the first instance, to a trustee of the name of Franklin, to hold on such trusts as the intended wife, Mrs. Barker, should by deed or will appoint, and, subject thereto, on trust for her separate use for life, with certain other limitations over.

The plaintiff claims, as devisee of the manor of Watton Hall, with the appurtenances, to be entitled to five several allotments, made under an inclosure act, and which, for distinction sake, have been described as allotments 1, 2, 3, 4, and 5. The defendants are persons who submit that the several allotments in question did not pass under the limitations which were contained in this testamentary appointment of the manor with the appurtenances, but they submit that they passed under the limitation of the residue of her property comprised in the marriage settlement; under which limitation of the residue, they say, they are now entitled, as having become purchasers of the property in question; and the question lies between the claim of the plaintiff, as devisee of the manor and appurtenances, and the claim of these parties, the defendants, who now represent the interest which was devised by the residuary gift in the testator's will.

The Inclosure Act was passed in the year 1801, 41 Geo. 3, and was called "An act for inclosing the common lands of Watton and Carbrooke;" and that act contains, among other things, a recital that Franklin is, or claims to be, lord of Watton Hall, in Watton, and is entitled to certain other property in the vicarage of Watton afore-

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said; it recites his title as being trustee for Elizabeth, the wife of Benjamin Barker, and it also recites that "Thomas Scott and Charles Lionel Scott are, or claim to be, lords of the manor of Rockolls, in Watton aforesaid." By that act, power was given to the commissioners to make allotments to the several parties interested in the common situate in Watton and Carbrooke; and the only clause material to be adverted to is this, by which, among other things, it was enacted that the commissioners should "set out and allot unto and for the respective lord or lords, lady or ladies of the soil of the said commons and waste lands, or their respective assigns, such part of the lands and grounds hereby directed to be divided and allotted within the said parishes of Watton and Carbrooke respectively, as in the judgment of the said commissioners shall be a full recompense and compensation for his, her, or their right or rights in and to the soil of the said commons and waste lands respectively;" on which I observe, that the only right in which this is to be allotted to them is, their right as the lord or lords, lady or ladies of the manor; and their right in and to "the soil of the said commons and lands," is recited to be simply in that capacity, as lord of the manor; and the compensation is to be made to them in that capacity only. Then further, there is a clause in the act, which directs that the several allotments which shall be made in respect of freehold or copyhold lands, shall be held according to the same nature and the same tenure as the rights in respect of which they are allotted.

Under this act, the commissioners, on the 24th of December, 1803, made allotments of these several pieces of land, which are now claimed in the present suit; they allotted the lot called No. 1, to the lord, as his soil allotment, and in respect of compensation for his interest in the soil of the manor. They allotted the lots 2, 4, and 5, to the devisees of a person called Thomas Scott the elder, and those devisees were Thomas Scott the son, Charles Lionel Scott, and Edward Harvey Grigson; and they allotted the piece of land called No. 3, to the trustees of a settlement, dated the 3d of June, 1791, under which a gentleman of the name of Thomas Scott, and his wife, were interested. In 1803, Philip Ryley Taylor and Edward Harvey Grigson were appointed trustees under the marriage settlement of Mrs. Barker, the settlement of 1796, in the place of Franklin; and a conveyance was made to them of all the trust property. Certain personal estate was vested in the trustees of the same settlement. By another deed, of even date, the trusts of the personal estate were declared to be, among other things, to lay out the same in the purchase of land, and which land was to be held to the same uses as the lands comprised in the settlement. Messrs. Taylor and Grigson entered into contracts for the purchase of lots 2, 4, and 5, (lot 1, having been allotted to the lord, in respect of his interest in the manor;) and by bargain and sale dated the 6th of April, 1804, the devisees of Thomas Scott, in that capacity,—as to which I shall have to say more presently,—made a bargain and sale of those lots, among other things, to Taylor and Grigson, and the purchase was made out of moneys comprised in the settlement; and the lands were

to be held on the same trusts as the lands comprised in the settlement. On the 4th of May, 1804, the persons interested under the settlement of Thomas Scott, of 1791, (which I will call Crockley's Settlement, to distinguish it from the first,) namely, Thomas Scott and his wife, conveyed by surrender lot 3, to Taylor and Grigson, and that lot 3 was also bought out of the trust moneys, and was to be held by them, therefore, on the trusts of the settlement. Therefore they, as lords of the manor, had become owners of lot 1, in respect of the allotment which had been made to the lord for his right of soil, and they had become owners of the lots 2, 3, 4, and 5, in the manner I have described; and it is contended by the plaintiff that these allotments, as they have all been made in respect of copyhold interests, and must therefore be taken as of copyhold tenure, vested in these trustees as lords of the manor, and consequently the conveyances operated as an extinguishment of the copyholds. That is the contest on the part of the plaintiff.

This having been done, it appears that, between 1804 and 1806, the different allotments that have been mentioned were thrown into a farm, called Neaton Farm, surrounded by a ring fence; and that the allotments, as to part of which it is also said the fences were taken down, so that the copyholds were intermixed with the other property, being all comprised in the Neaton Farm, were demised, together with some other property which was not within the ring fence, under one lease, dated the 25th of June, 1807, to a gentleman of the name of Buxton, who was afterwards mentioned as the purchaser of this property, and they were demised for thirteen years from the Michaelmas previous, and held by him under this lease until the time that he became the purchaser. This was the state of the property at the time the testatrix made her will. By the will, or rather testamentary appointment, of Mrs. Barker, dated in December, 1807,—after having given certain other property, on which nothing particular arises, except that it is remarkable that she gives one copyhold tenement, which is afterwards mentioned in a codicil by her as having been given in her residue,—she directs and appoints, “all that the manor or lordship, or reputed manor or lordship, of Watton Hall, in Watton, in the said county of Norfolk,” &c., with the “appurtenances to the said manor or lordships belonging or appertaining; and, also, all that the parsonage or impropriate rectory of Watton aforesaid; and, also, all and singular glebe lands, tithes, oblations, obventions, profits, advantages, and appurtenances whatsoever to the said parsonage or rectory belonging or therewith held, used, occupied, or enjoyed; and, also, all that the perpetual right of patronage and presentation of, in, and to the vicarage or parish church of Watton, and also the market-house,” and certain other property which she mentions more in detail: also (which it is material to mention) “a meadow or tenement, with the barns, buildings, lands, meadows, and pastures thereto, belonging and now used therewith, situate, lying and being in Watton aforesaid, called the Wick Farm, containing 290 acres, more or less, now in the occupation of Thomas Lincoln or his under-tenants, at the yearly rent of 378*l.* 4*s.* 4*d.*; and all other my

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messuages, lands, tenements, and hereditaments situate at or in Watton aforesaid and town or towns next or near adjoining, which are now in the tenure or occupation of the said Thomas Lincoln: and all plantations of trees, &c.; and, also, all that capital messuage in Watton, in which I now reside." She limits this manor, therefore, with the capital messuage in which she dwells, with the farm of Wick, and some other premises, to the use of the trustees, Watts and Grigson, for a term of 800 years, and, subject to that term of 800 years, she limits the property to the use of John Raby Hicks, the father of the present plaintiff, with remainder to the first son of the body of John Raby Hicks and the heirs male of his body, and then over to the second, third, fourth, fifth, and other sons of John Raby Hicks. I should state further, that towards the close of the limitations which I have specified, and before she arrives at the gift of the residue, she directs that the several limitations and appointments thereinbefore contained shall extend as well to the lands and hereditaments settled on her marriage, as to any hereditaments since purchased or received by way of exchange or allotment, as far as the same lands and hereditaments are comprehended within the descriptions hereinbefore contained. That immediately precedes the gift of the residue. Then, she appoints all the residue of her real estate in Watton and the towns adjacent, over which she had any power of appointment, to Harvey and Hebgin in fee, in trust to sell and to pay debts.

That is the whole of the will as far as it is of any importance to the consideration of the present question; and then there came three several codicils. Nothing material turns on the first, except that she thinks she has not given quite sufficient property with reference to the payment of her debts; and she directs a further additional property to be sold for the purpose of raising 1,500*l*. The first codicil was dated in September, 1809. The second codicil was dated in February, 1812, in which she makes certain provisions for servants in whom she appears to have been interested, and she corrects also a very small and minute mistake which she had made with reference to the amount of rent of one of the properties she had given by her will. Then; there is the third codicil, which is of more importance with reference to this question, by which third codicil she states she had, by her will, directed and appointed the residue of her real estate in Watton and towns adjacent to be sold. She says: "Now, I do hereby revoke such direction and appointment, as far only as the same relates to the hereditaments and premises by me hereafter otherwise disposed of, that is to say;" and then, she gives two several cottages or tenements to two of her servants; and the only comment to be made on this statement, which I am now making of the facts of the case, is this, that, as regards the codicil, she had made a mistake as to one of the tenements; it was certainly not comprised in the residue she had given by her will, but was a property specifically given to somebody else, and both those tenements were copyhold, and, therefore, open to the remark made on the part of the defendants, that she supposed she had given some copyholds by the disposition

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of the residue of her estate. Then, the fourth codicil contains nothing of any material importance. She directs there, among other things, her capital messuage to be sold. The date of the last codicil was the 16th of October, 1812; and it appears that in 1813 she died.

Now, in the mean time, between the date of her will and her first codicil, there was a substitution of different trustees. In June, 1809, Mason was substituted as a trustee instead of Mr. Taylor, who had died, and the usual conveyance was made to Mason and Grigson, the surviving trustee, and, therefore, they represented the estate, at that time, instead of Taylor and Grigson. Now, after this, the circumstances that took place, were these. Soon after the death of the testatrix, in the year 1814, it appears that Mr. Buxton, the tenant of the property under that lease, entered into a contract for the purchase of the property, which was conveyed to him in 1815. The property was conveyed to him by the several parties interested in the residue which was given for sale, treating the property as having been comprised in the residue; and Buxton, having thus purchased, remained in possession until 1835, when he died, having made his will; and, ultimately, Sallitt himself became the purchaser of the same property, and has held the property as purchaser ever since up to the time of filing the bill. Now, in 1831, the plaintiff became entitled to this property under the limitations of the manor, supposing the testatrix to have devised the property to him. He was an infant, and did not attain his age until 1849, and, within about a year and a half of his attaining his age, the present bill was filed, which raises the question now in dispute.

The main questions which have been argued, and very ably argued on both sides, have been two; the first question being, (assuming, for the sake of the argument on the first question, that the copyholds have really become extinguished in the manor by the several purchases which I have referred to,) whether, admitting that to be the case, they did, in effect, pass under the devise of the manor, with its appurtenances, or whether they passed by the gift of the residue. Then, the second argument, on the part of the defendants, has been, that, even if it should be held that the property did, in effect, pass by virtue of the extinguishment under the devise of the manor, yet it is the duty of the plaintiff to establish the fact of the extinguishment, and that the circumstances shown in this case, have not only failed to establish that fact, but, as regards some of the property, distinctly prove no such extinguishment has taken place. Those are the two main points argued as to this case.

Now, then, first of all, as to the question whether or not the property passed under the description of the manor of Watton, with its appurtenances, in the manner described in the will. It was argued in respect of this, that although, in truth, under the devise of the manor, all copyholds which have been extinguished must necessarily pass—that although this might be sufficient without any thing else to indicate the intention of the testatrix to have this effect, yet, under the circumstances of this present case, the sense of the word “manor” must be restricted, and that the word “manor,” contained

in this testamentary appointment, must be held to have been intended to operate simply on what may be called the manorial rights themselves, that is, upon the various incorporeal rights associated with the manor, in contradistinction to the other appurtenances of a more corporeal nature connected with the manor; and two cases were cited to show that the word "manor" may be used in such restricted sense. As to that, I apprehend that it was hardly necessary that any case should have been cited, because, no doubt, any party to a deed or will may always restrict the meaning of his words, by the instrument in which the words are contained, so as to give them a sense less extensive than the ordinary legal signification of the words, if that intention be apparent. Therefore, I do not comment on those two cases in detail. They were cases that establish the principle to its fullest extent; but they were cases in which the inference was absolutely necessary from the terms of the instrument itself, the instrument being unintelligible or contradictory, if the word "manor" had been construed in a larger or more extended sense.

Now, it is urged here, that the intention is to be discovered, not merely by the instruments themselves, namely, the testamentary appointment and the indenture under which the appointment was made, but further by the circumstances that surrounded the testatrix and the peculiar position of this property; and it was urged with considerable force that, looking to the circumstances that took place after the purchase of the property,—the inclosing it within a ring fence, the demising of it to one tenant, all at a fixed rent—it can scarcely be inferred that there was an intention to divide the property so circumstanced from the other farm, the Neaton Farm, which was confessedly comprised in the residue. Now, looking at these external circumstances, I think it of extreme importance that one should adhere closely to those rules that have been completely settled with reference to the amount of the extrinsic evidence admissible for the purpose of the construction of any instrument, and therefore one must be very guarded in allowing for one moment any departure from the strict line which has been drawn by the several authorities which seem to me to have surrounded every possible view of the question, and to have determined every difficulty that can arise upon it. In truth, as to external circumstances, every will and every instrument that is made must contain a description of persons and property, and the force of that description can only be ascertained with reference to external subjects, the persons and property described; but I think it clearly settled that if the description in the will in its primary meaning, (by which I mean its legal meaning, wherever a definite meaning can be given to words used,) is not found to correspond with any external object exactly, then, and then only, it is lawful for the court to look at those external objects surrounding the testator, for the purpose of ascertaining whether, there being in effect no external object to which the description will literally and properly apply, there is not something to which it might be applicable in a secondary, although not in quite a correct sense. I believe that case, and the case of two external objects to which the description can

apply, raising what is called a latent ambiguity, are the only two cases in which it is lawful for the court to look at external circumstances as affording any indication of the intention of the testator; and that if you find in looking at the external objects that the words of the will do accurately refer to some given person, or some given property, you can only look back to the language of the instrument which you are to construe, in order to ascertain what the exact meaning of the will is. There are two classes of cases (I take the two strongest cases in each class) which seem to me completely to settle the question. There is one class of cases which shows that if you do find words accurately corresponding with the external subject, you can in no way add to or increase the effect of those words. The case of *Doe v. Chichester*, 4 Dow, 65, is the strongest, where the testator gave the whole of his estate of Aston; and it was found that he had always in his books entered a certain farm as part of his Aston estate, called it his Aston estate, and treated it in various documents as his Aston estate, and given receipts under that description; nevertheless, it was held that, from not being in the parish of Aston, it could not pass under that devise of the testator's estate of Aston. Then the other point, which I apprehend to be clearly settled, and which is applicable to this case, is, that you cannot exclude any thing which would naturally and ordinarily pass under the precise and primary legal effect of the words contained in the instrument by reference to those external circumstances. That is the case of *Doe d. Templeman v. Martin*, 4 B. & Ad. 771, one of the strongest cases of that description, where every external circumstance would seem to indicate that the testator could not have intended such a disposition as he made of his property, but, nevertheless, having used words sufficiently large to include it, it was held that it was impossible, under those circumstances, to exclude this particular property from the effect of the devise. Now, instances of the same character, in fact, occur continually in the questions which arise as to whether or not a party has executed a power where he has a property as to which he has both a power and an interest. If he devises all his freehold estate, and he has no freehold estate except that over which his power operates, then that freehold will pass; but if he has one acre alone of freehold estate, and 1,000 acres the subject of his power, not one acre of the property comprised in the power can pass under that description. That is, also, as strong an illustration as any of the necessity of confining yourself to the clear legal effect of the words used in the will itself. I think, therefore, in this case, it is not competent for me to look at all at the external position of the property in order to establish the construction of the word "manor" as used in the will of this testatrix.

But there remains, no doubt, a question of considerable importance; how far, upon the instrument, any such intention on the part of the testatrix to restrict the effect of this gift may be discovered; and for this purpose, I consider I am at liberty to look, not only at the will itself, but at the deed which created the power of which the will was only an execution. There was only one deed creating the

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power, but there were several other deeds which conveyed the property, the subject of that power. When one looks at this testamentary appointment, one must treat it as an instrument which is to be, not only in construction of law, but, I apprehend, under any ordinary and common sense construction, taken to be a part of the very conveyance by which that property is to pass; and the settlement of 1796, and those instruments which execute the power, are, in truth, one and the same instrument; and although it was argued that this would in effect be the admitting of external circumstances, if one were to consider this settlement as having an effect on the construction of the will, I apprehend it cannot be so; I would put it simply in this form,—suppose you had found, in the deed of 1796, something which clearly restricted the particular operation of words, which would otherwise have a more extended effect, but which, on the clear construction of the deed itself, must have a limited operation; then, I apprehend, a power executing the control over that property so circumstanced, and using the same expressions, must be held to use the expressions in the same sense as that in which they were used in the deed. I do not see how any rational construction could otherwise be put on the effect of the instruments, which in law are but one instrument, by which the property is disposed of. Looking at the deed of 1796, and looking, perhaps, as I am entitled to do, to the property which, afterwards having been purchased, (and this branch of the argument assumes the extinguishment,) must be supposed to have fallen into the deed by the different purchases, I am also entitled to look into the subsequent instruments to see what did so fall into the property, and to look into the subsequent instruments of 1804, by which the several copyholds were conveyed, and the appointment of new trustees in 1803, which is recited in the will itself. The will does not go beyond 1803, because that is the last instrument recited. It does not recite the purchases of 1804; and on this branch of the argument I have to assume that those two instruments of 1804, in effect, dropped that property (if I may use the expression) into the manor as the general receptacle.

Looking at those instruments then, Mr. Toller certainly advanced a very ingenious argument, and furnished me with a comparative tabular statement of the whole of the property comprised in the deed of 1796, so far as that property could be there described, (not, of course, comprising the after-purchased property,) and the limitations contained in the will, placed side by side, in order to make out this proposition. He contended, that, if one looked at the deed of 1796, and the deed of 1803, and the description of the property there described, and the description of property after purchased, one would find the testatrix had gone carefully through the whole of the deeds, or the draughtsman who prepared her will for her had gone carefully through the limitations of the settlement of 1796, and had picked out from the settlement of 1796, such several parcels as she meant to dispose of in a specific manner by her will, or testamentary appointment, and then had given the whole of the residue, which must, on the comparison, be taken to mean all those parts that had not been

so specifically picked out; and accordingly, if you find that, in effect, in selecting the different parcels from the deed of 1796, she had omitted all the territorial incidents of that manor, and had only included the incorporeal incidents of the manor, you would infer from that that she had intended the territorial incidents to fall into the residue and to pass by a bequest of her residue. That was the argument. He proceeded afterwards to fortify it by further comment on the effect of the codicil with reference to this particular property; but as regards the effect of the limitation in the will, it was placed on this ground.

Now, in order to test this argument, one must look to the description contained in the will and the description contained in the settlement; and certainly one does find this, that the settlement describes the property as "all that manor, or lordship, or reputed manor, or lordship of Watton Hall, in Watton, in the county of Norfolk, and also all that site of the said manor, or lordship, with the demesne lands, waters, pools, fishings, heaths, marshes, moors, wastes, plantations, wood grounds, commons, common of pasture;" — that, I think, is the whole of the territorial property, if I may so describe it, — and the settlement goes on "rent of assize, quitrents, services, courts leet, view of frankpledge, and all that to view of frankpledge doth belong, courts baron, perquisites and profits of courts and leets, waifs, estrays, deodands, felons' goods," — words of the largest possible description — but we find the will appointing thus: "all that the manor, or lordship, or reputed manor, or lordship of Watton Hall, in Watton, in the said county of Norfolk, together with all courts leet, courts baron, fines, quitrents and profits of courts, and all other the rights, members, privileges, advantages, and appurtenances to the said manor, or lordship belonging, or appertaining." The testatrix then proceeds to the rectory, which is the next thing contained in the deed; and upon the contrast of the mode in which the manor was limited, I think, mainly turned the argument of Mr. Toller, with respect to this point; although he further observed, it was also remarkable that throughout the will, when she was giving property in the shape of land, specifying the exact rents at which they were held, she seemed to wish to do that, to indicate what she meant to give to the person interested under the will, that the exact amount of the benefit conferred might be apparent to all parties connected with her; and that to such an extent that in the second codicil she had corrected a very minute error of a few pounds in the description of the rent; and further he said that, in describing the property, she describes the capital messuage which, in bulk is copyhold, and which, therefore, according to the argument of the plaintiff, would have passed by the word "manor," and the description of which, therefore, was unnecessary; and besides that, when you come to the codicils you find that by the third codicil she recited that she had disposed of her residue to the extent after mentioned, and then proceeded to give two cottages, both of which were copyhold; and therefore the inference was a necessary one, that she intended, by her disposal of the residue, to pass copyhold property which otherwise would be included in the manor; and I think that

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argument on the codicil was one of the strongest points urged in reference to this particular view which I am now considering. It appears to me, however, with regard to the rule of law on a construction of this kind, that the construction must be absolute by a necessary inference. I do not think any thing short of a necessary inference will enable the court, at any time, to give an effect to any word different from that which is the legal and proper operation of the word used. In both the cases cited by Mr. Toller, of *Moseley v. Motteux*, 10 Mee. & W. 533, and *Doe v. Morris*, 2 Bing. N. C. 189, it really was impossible to interpret those instruments without seeing that in one case the advowson, and in the other case the encroachment, which had existed for twenty years before the conveyance of the manor, were necessarily, and by necessary inference, excluded.

Now, the difficulty here on the part of the defendant on this branch of the argument is, to make out from those points which he has raised that there is a necessary inference for the exclusion of the copyholds in question from the gift of the manor. It appears to me that it would be going a great deal too far if I were to attempt to raise this necessary inference from the abbreviated description of the manor which appears on the face of the will as contrasted with the deed. It must be remembered that the allotments in question were all acquired after the deed of settlement, and after the conveyance to the two new trustees in 1803, which are the only instruments recited in the will; so that, in the first place, you have this circumstance as far as any thing appears on the will, that you have only the settlement itself referred to in the instrument of 1803, which was an instrument that existed before the year 1804, when these particular copyholds fell into the manor. Therefore, it would be a very strong presumption for the court to make, to say that the testatrix must be necessarily inferred in this abbreviated description to have excluded these parcels, when, in truth, she was copying out into her will from the settlement words which were used at very great length in the settlement, and at much greater length than probably any person would have wished to use in the will, and when she does not appear to have been making any precise reference either to one description of property, or the other. But, further than this, it does appear that the fact of the allotments having been made and purchased was present to her mind. She had not any description of them, as far as one can see on the face of the will, before her, because she had only the description of the deeds of 1796 and 1803 before her; yet the fact of the allotments having been made and purchased was present to her mind, as appears from the words which immediately precede the gift of the residue; and although it is perfectly true that those words may well be applied to other property given besides the manor, yet still, the utmost that can be said in favor of the defendant's view is this, that they do not strengthen the plaintiff's case; and I think it is impossible for the defendant to contend with those words there added that there is any additional force or additional effect to be given to the construction on his part, namely, that there was an object in her omitting these territorial lands, namely, to exclude these allotted pieces of ground.

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Then if the testatrix, in describing part of the subject of her power in the will, had omitted, for instance, a full description of the wastes and commonable rights before the Inclosure Act, and had merely said she devised the manor with the appurtenances, I think it could hardly be said that she intended to exclude the wastes and to exclude the commonable rights from the gift. That would be a very strong argument to raise merely from comparison of those two instruments. Further than that, it must be recollected you have to infer a purpose, not a particularly natural one, namely, a purpose, (assuming as I always do on this branch of the argument the extinguishment,) to sever the copyhold interest altogether from the manor, giving it away once and for all; because, if given in the mode now asserted, it would be given as freehold and disposed of altogether away from the manor, and then she must be held to have the intention of losing forever all those rights which as lady of the manor she would have in respect of admission to, and renewals of, those several pieces of copyhold. I have all that to infer as her intention, which certainly there is nothing on the face of the will to justify me in doing. Then, besides this, it must be recollected that all the force of the defendant's argument, after all, turns on the word "residue," which the defendant said means this, the residue after having picked out all these several parts from the will.

.Now, the word "residue" is in itself a very weak word in order to raise an inference of this description. In the first case cited, it distinctly appeared that the advowson was referred to. Here, it is not contended that there is any actual gift of this property by description, or any thing which raises a necessary inference of gift by the description, but you have simply the word "residue." It is not like the residue of a person's estate generally, but it is the residue of property over which she has a disposing power, and therefore may be intended to sweep in any thing, which is not otherwise disposed of. Yet it is a word extremely weak to raise the inference which is attempted to be raised, solely from the circumstance of the lady having abridged in her description of the property the long terms used by the conveyancer in the description in the settlement. That is all that appears to me to be the result of the different descriptions contained in the will from that contained in the deed of 1796. However, this particular codicil has been strongly relied on, and no doubt the defendant is entitled to the benefit of this observation, that by the third codicil she does say she has included in her residue two cottages both of which are of copyhold tenure, and it appears that one of these cottages was not in effect included in the residue; one of these cottages had been specifically given to another party; and, therefore, the inference I am now asked to raise, which is to control the legal effect of the word "manor," is to be found in an instrument executed in 1812, five years after the date of the will, from which it is quite apparent she has forgotten one circumstance, namely, how she had disposed of one particular cottage which she said she had included in the residue, and which it is clear she had not done; and from that I am to suppose she had clearly before her mind the legal intention and

object in her will, and that that intention and object was, to comprise the several pieces of copyhold, these several allotments which are mixed up with the freeholds, and not to include them under the gift of the "manor." Now, I confess that when I find she had forgotten part of her will, and had made one clear mistake, as it is very natural she would do after a five years' interval between the date of one instrument and the date of the other, it seems to me extremely strong to say I am to raise a conclusion, by way of necessary inference from the recital contained in the third codicil, of her having made that gift of the copyhold in the residue, which after all, may be just as much a failure of memory as the failure of memory with reference to the gift of the first piece of land. How am I to tell in what instance she has failed in recollecting the peculiar disposition of her property? How am I to arrive at a necessary inference from this clear misrecital as to one? How am I to form a clear inference, that that recital as to the second cottage is correct, although the recital as to the first is erroneous? and, therefore, it must be taken she intended clearly to dispose of those copyholds by her residuary gift contained in her will. It is perfectly plain that even in a much stronger case of *Doe v. Hicks*, 8 Bing. 475, referred to on the subject, if you once get a clear gift contained in the will you cannot, on any thing that is in the least the subject of doubt contained in the codicil, raise an inference by which the clear gift in the will can be in any thing restricted. I think, therefore, going through the various grounds suggested, and which certainly were suggested with considerable force, and some of them — in fact, all of them I may say — deserving considerable weight and attention, yet, looking at the several instruments, which I think I am lawfully at liberty to look at, I cannot arrive at the conclusion that it was the intention of the testatrix to sever the manor from the copyholds, and to give the manor without those copyholds which have fallen into it, and to throw those copyholds as part of the residue to be disposed of for other purposes mentioned in the will.

Now, the second branch of the argument remains to be considered, which was upon the point of extinguishment. I have assumed throughout, at present, that the extinguishment had taken place. Then it was urged by Mr. Toller that the extinguishment must be proved by the plaintiff, and that he has not proved it with regard to lot 1, and that with regard to lots 2, 3, 4, and 5, he asserts the contrary is proved. He says, with regard to lot 1, the extinguishment is not proved on this ground, that it only appears in the allotment that the allotment had been made to the then trustees as lords in respect of their right in the soil of the commons; that the act of parliament shows that there were two manors in Watton. for it recites there was the manor of Watton, of which Mr. Franklin was then lord, and the manor of Rockolls, of which the two Scotts were the then lords. Therefore, it may be that Mr. Franklin was entitled to other commonable rights not simply as lord, and with respect to which commonable rights these allotments may have been made to him. I think that question is really set at rest, when one comes to look at

the act of parliament, in a very clear manner, because I think it appears on the act of parliament, that any allotment to be made in respect of the soil was only to be made to the lord as lord, in respect of his interest as lord. The passage in the act is, "that the commissioners shall set out and allot unto and for the respective lord or lords, lady or ladies of the soil of the said commons and waste lands." They are called the lords of the soil of the said commons and waste lands, the said commons and waste lands being the whole of the commons and lands in the act; and they are to allot to them "such part of the lands as in their judgment shall be a full recompense and compensation for his or their right or rights in or to the said commons or waste lands." Therefore, it is only as lords that they are entitled to the soil. The allotments are to be made to them in respect of their rights to the soil. The allotments are to be of the same tenure as the several lands were in respect of which they are allotted; and this piece of land is allotted to Franklin, he being recited in the act to be lord, and stated in this clause to be the owner of the soil as lord. I have not any doubt, under these circumstances, that it is made out that that was part of the manor, and no question of extinguishment arises to that lot. It was allotted to him as part of the manor, and taken by him as a portion of the manor.

As to the other lots, 2, 4, and 5, a much greater difficulty was started by Mr. Toller, and until I came to look at one date which was not given to me, the point seemed to me to be involved in some difficulty and obscurity. The case raised is this: As to lots 2, 4, and 5, the lord never obtained the legal interest in the copyhold; for those lots, 2, 4, and 5, were held originally as copyhold under a settlement of the 15th of December, 1763, by which they were surrendered to the same uses as the freeholds comprised in the settlement. The freehold was settled to the use of Thomas Scott for life, with a remainder for a jointure of 100*l.* a year to the wife for life, with remainder to trustees for a term of five hundred years to secure jointure and portions, remainder to the heirs of the body of the wife of Thomas Scott, in fee. This, it was said, was a contingent remainder in the heirs of the body of the wife. Then it is said, that in 1791, there was an attempt to get in this contingent remainder; and a deed was executed forfeiting the contingent remainder of the freeholds, or operating as a forfeiture; a recovery was suffered, attempting to bar this contingent remainder in the copyholds, which, as was truly said, would not have that effect. Then it was further said that in 1815, and not till then, this copyhold interest in the heirs of the body of the wife of Scott was got in; and accordingly, not having been got in up to that time, and not being capable of passing by the will of the testator, Thomas Scott the elder, the copyhold land never had got into the possession of the lord, and the extinguishment consequently had never taken place. Thomas Scott the elder, after this transaction, (the date of his death is not material, except that he died before 1804,) devised this property by his will. His devisees were his two sons, Thomas Scott and Charles L. Scott, and Grigson; and they executed the bargain and sale of the 6th of April, 1804; and the

question is, whether they had then such an interest as would be sufficient to extinguish the copyhold. Mr. Toller says the contingent remainder was not destroyed, because the lord's interest supported it; and that is certainly true with reference to any attempt to extinguish it; but the facts were these: Scott was tenant for life, with remainder to the use of the jointure, with remainder to the heirs of the body of the wife, with a reversion to himself in fee. The wife appears to have died in 1812. The consequence is this—then when Scott, the tenant for life, died, there being a contingent remainder to the heirs of the body of the wife, the wife being living for several years after the death of the tenant for life, the contingent remainder never took effect; and, therefore, the reversion in fee fell into Scott at once. The authorities are perfectly clear upon that, that although the lord's interest supports a contingent remainder to prevent its being destroyed by any tortious act, yet there are contingent remainders in copyhold as well as in freehold; and these contingent remainders must take effect at the moment when the particular estate determines, or they will never take effect at all. *Lane v. Pannell*, 1 Rolle, 438, referred to in *Gilbert's Tenures*, p. 266, and *Habergham v. Vincent*, 2 Ves. jun. 233. Accordingly, therefore, the contingent remainder to the heirs of the wife never did and never could have taken effect; and on the death of Scott, when it ought to have taken effect, the reversion in fee had fallen in, and it passed by his will; and the parties interested in the copyhold under the will of Scott were capable of making that bargain and sale, and having made that bargain and sale, the copyhold passed to the lord sufficiently to extinguish it in the manor. That, accordingly, clears the right as to lots 2, 4, and 5, and makes the extinguishment complete as to them.

The remaining lot, lot 3, stands on a different footing. This property was comprised in Crockley's settlement, by which freehold estates were settled to Crockley for life, remainder to Thomas Scott for life, remainder in strict settlement; and there was a covenant to surrender the copyholds to the same uses. In that deed, also, was contained a power of sale to the husband and wife, by which they were enabled to sell the property. In 1791, Crockley was admitted to the uses of the settlement. In 1795, Scott and his wife were admitted for their lives, and the life of the survivor of them; and there was nothing further said on that admission; and, therefore, the copyhold stood, in fact, limited to the uses of the settlement, with this admission of Scott and his wife. But, Mr. Toller said that the admission of Scott and his wife let in all the subsequent uses of the settlement, which were uses in strict settlement in remainder; and no doubt the admission of the tenant for life is the admission of those in remainder, but at the same time subject to the uses of the settlement. But the power of sale remained in Scott and his wife, and this power of sale was exercised in the year 1804, and a surrender was made in the same year. That was a perfectly legitimate surrender. They had a power of sale, which displaced all the other parties interested, and the lord was perfectly right in admitting the parties entitled under that surrender. I think, therefore, in conclusion, that the whole

of these five lots did clearly pass to the parties who were devisees of the manor, in contradistinction to the trustees who were devisees of the residue.

Then arises the question upon the statute of limitations. If it had been at law upon a mere legal title, the plaintiff, in effect, did not acquire any title on which he could sue until 1849; and the parties, having taken with full knowledge of all the instruments, must be taken to have acquired the property, with all the rights attaching to it; and nothing has passed to them but a dry trust. Supposing that I am right in the decision that I have come to as to the testamentary appointment, it is simply handing over that trust estate from one party to another, subject to all the trusts and liabilities, the necessary consequence of their being affected with notice of the trusts. Therefore, I do not think the statute of limitations has any application either to the plaintiff's right to recover at all, or to limit the extent of his right to such recovery. I think these parties must be held to have been trustees from 1831 of the rents and profits for the plaintiff; and the consequence will be, that a decree must be made, declaring that, under and by virtue of the appointment, the five lots in question passed under the devise of the manor of Watton Hall, and that the same became vested in the plaintiff on the death of his brother, as tenant in tail; and the plaintiff having barred the entail, I must direct the defendant, Sallitt, to concur with all necessary parties in conveying the said several pieces of land to the plaintiff, free from incumbrances created since the death of the testatrix. Then, there must be an account of rents and profits received by Buxton in his lifetime, since the plaintiff's title accrued, and also by his devisees since his death, until the purchase by Sallitt; then, an account of rents and profits received by Sallitt since that time, and an inquiry of what the property in question consists. There will be no costs on either side, as the difficulty has been occasioned by the way in which the testatrix has expressed her intentions in her will.

The defendants appealed from this decree.

The *Solicitor-General*, *Rolt*, and *Selwyn*, for the plaintiff.

*Wigram* and *Toller*, for the defendant, Sallitt. On the question as to the period to which the accounts of the rents and profits should be carried back, the following cases were cited: *Cholmondeley v. Clinton*, 2 J. & W. 175; *Habergham v. Vincent*, 2 Ves. jun. 204; *Drummond v. The Duke of St. Albans*, 5 Ves. 432; *The Attorney-General v. The Corporation of Exeter*, 2 Russ. 45; *Pickett v. Loggon*, 14 Ves. 215; *Edwards v. Morgan*, M'Cle. 554; *Bowes v. The East London Waterworks*, 3 Mad. 375; *Clarke v. Yonge*, 5 Beav. 523; *Grant v. Ellis*, 9 Mee. & W. 113; *The Dean of Ely v. Bliss*, 2 De G. M. & G. 459; s. c. 19 Eng. Rep. 190.

At the conclusion of the argument, their lordships gave judgment, affirming the decision of the Vice-Chancellor upon the principal ques-

tion, and reserving for consideration the question, from what time the plaintiff was entitled to an account of the rents.

*January 14.* The LORD CHANCELLOR, (LORD CRANWORTH.) This case stood over for the court to give judgment on one point only, which was as to the period of time during which the account was to be directed in favor of the plaintiff. Now, the way in which I view the case is this: if the property had not been in trustees, but had been a mere legal devise, the plaintiff, in an action of trespass for mesne profits, might have recovered all the rents that accrued due during his minority: of that there can be no doubt; because, although in such an action the defendant might have pleaded the old statute of limitations of James the First, yet the plaintiff could have replied to that, that during that time he was an infant, and it would have been a good replication, and, consequently, the plaintiff would have recovered the whole of the rents. Now, that being so, I should be very loath, indeed, to introduce any rule which should make a distinction, in this respect, between that which is technically an equitable estate and that which is technically a legal estate. Such distinctions are rather discreditable to our institutions, when, in truth, there is no difference. It is a mere formal difference that persons not familiar with the law would not understand. The principle ought to be the same in both courts; or I should have said rather, it was a case in which the principle *æquitas sequitur legem* ought to prevail.

Now, in order to show that that was not so, the case which was mainly relied on was that of *Drummond v. The Duke of St. Albans*.

Before, however, I advert to that, having looked through the authorities, I will call attention to some of the more leading ones in chronological order, which will illustrate my view of the case; and the earliest I shall advert to is the case before Lord Hardwicke, of *Dormer v. Fortescue*, 3 Atk. 124. I cite it only for the purpose of some observations of Lord Hardwicke which are to be found in 3 Atk. 130. Lord Hardwicke says: "But, as I said before, there are several cases where this court does decree an account of rents and profits, and that from the time the title accrued. As where a man brings his bill in this court, where there is a trust, and upon a mere equitable title; there he shall recover the estate, and the court will give him an account of the rents and profits, and that from the time the title accrued, unless upon special circumstances; and then they will restrain it to the time of bringing the bill; as where the defendant had no notice of the plaintiff's title, nor had the deeds and writings in his custody, in which the plaintiff's title appeared, or where the title of the plaintiff appeared by deeds in a stranger's custody. So where there hath been any default or laches in the plaintiff in not asserting his title sooner, but he has lain by, there the court has often thought fit to restrain it to the filing of the bill. So, in the case of a bill brought by an infant to have possession of the estate, and an account of rents and profits, the court will decree an account from the time the infant's title accrued; for every person who enters on the estate of an infant enters as a guardian or bailiff for the infant." Therefore, the prin-

ciple said down is, that, unless there be laches or some unfair dealing, or something which is to take it out of what Lord Hardwicke considers to be the general rule, *prima facie* the party is to account for rents during that time which is equivalent to accounting for the whole, namely, during the time he has been in possession. Now the next case in point of date—I do not mean to say there may not be many intermediate ones—but the next case is one before Sir William Grant, of *Pettiward v. Prescott*, 7 Ves. 541. All the cases I am now going to cite, except *Drummond v. The Duke of St. Albans*, were all cases very much relied upon by the defendant as being cases where the court had not decreed an account of rents and profits from any earlier period than the filing of the bill, or a period something much more recent than the accruing of the title. But I think that they will all be found to have depended on special circumstances. The first I refer to is the case of *Pettiward v. Prescott*, which was in the year 1802, before Sir William Grant. The facts of the case, as far as they are necessary to be mentioned here, are simple. Richard Astley gave a copyhold estate to Mr. Roger Pettiward, and gave all the residue of his property to his brother. It was supposed, and I imagine correctly supposed, that there was some defect in the devise of the copyhold estate, so that the brother took possession of the copyhold estate as well as of the residue of the property. But the bill was filed by Pettiward for the purpose of establishing an equitable title on the ground that the doctrine of election was applicable, and that Pettiward was entitled to the estate, although not legally devised to him; that the brother would be absolute devisee, except for the copyhold estate, and was bound to make his election. Having disposed of that, Sir William Grant goes on thus: “With respect to the other point, there ought to be no account beyond the filing of the bill. There is no infant, no breach of trust, in the case,” from which I infer that, if it had been the case of an infant, Sir William Grant would have held he must have given an account for bygone rents. “There is no infant or breach of trust in the case. John Astley lives and dies in the belief that no claim was to be made upon him,” he was not put to his election. “Under that supposition he disposes. Upon that supposition those deriving under him deal with it; and after a lapse of time nearly sufficient to bar the legal remedy, if any there had been, for the estate, this plaintiff asks not only the estate, but the whole rents and profits from the time the title accrued, which he has been so tardy in asserting. Constructively, it is true, the heir was a trustee of the rents and profits of the estate bound by the will; but it does not follow that he is always so. In *Dormer v. Fortescue*, Lord Hardwicke says, upon special circumstances, even in case of a trust, the court will restrain the account to the time of bringing the bill; and he specifies, as one instance, default and neglect in not filing the bill sooner, and says, the court has often thought fit to restrain it. The plaintiff, therefore, ought in this case to be restrained from carrying the account further back.” That is to say, Sir William Grant, admitting the general principle, was to follow the rule of law and to give the account during the whole period of

time, says in that case of *Pettward v. Prescott*, there are circumstances here that are within the exception laid down by Lord Hardwicke, and which justify me in not giving the account back to that remote period. The next case in point of date was one in 1807, before Lord Eldon, of *Pickett v. Loggon*. I have the case before me, but it does not bear very distinctly upon the subject. It was a case in which a bill was filed to set aside a deed that had been made by the plaintiffs, on the ground that the plaintiffs had been imposed upon, or at least, there had been some dealing with them in a way that this court would consider to be an imposition on them. They were very poor people. The husband of one was transported, and they were in very humble circumstances, living by their daily labour. I need not go into the case; but Lord Eldon, after great investigation in that case, was of opinion that the plaintiffs, in spite of the considerable lapse of time, did make out a case for setting aside the transaction. The sale that had taken place was a sale of the interest of the plaintiffs, if a certain brother of theirs was dead. The question was, whether the brother was dead. If he was, they had the estate, and were the heiresses at law. If he was not dead, they had no interest at all. Therefore, they had a sort of interest in the dark. But the question was, whether the brother was alive. Well, this transaction took place in 1788. They found out about 1792 or 1793 that the brother had been dead, and consequently that their title was good. Then they filed a bill to set aside the transaction, but I suppose in consequence of their not having good advice, or not having the means of proceeding, the bill was brought to a hearing, and the bill was dismissed by default, and that dismissal was enrolled. It was thought that that concluded the case; but afterwards the parties filed a new bill in 1812; and Lord Eldon, having gone minutely into the case, was of opinion that it was competent for them to do so, notwithstanding the dismissal of the former suit. Then Lord Eldon, in three or four words at the end, said, I am disposed to think that the account here ought not to go further back than the filing of the bill, on the ground that they were negligent of their rights. Although the expression is in that doubtful form, I have no doubt that the decree was drawn up accordingly, and that it may be taken as an authority that, under the circumstances of the case, Lord Eldon thought there ought to be no account beyond the period of the filing of the bill.

Then the next case, chronologically, is a case before Sir John Leach, of *Bowes v. The East London Waterworks*. In that case, Mr. Bowes was tenant for life, with remainder to his first and other sons, of certain leaseholds, the legal estate of which was in the trustees; and the trustees having power during the minority of any tenant for life to lease the property, they took on themselves to lease after the minority had expired. The tenant for life, supposing the leases to be all good, acquiesced in it, although it was in truth not a lease binding on him, because it was a lease in breach of trust. I think there were also some other objections, to which it is not necessary to advert. The bill was filed to set aside these leases after an acquiescence in them for

nine years; and Sir John Leach held that they were to be set aside: that they were leases granted not in pursuance of the power. Then he goes on thus in his judgment: "It is said that the plaintiff, having received the rent for nine years, has precluded himself from equitable relief in respect of the leases if he were otherwise entitled to it. If the plaintiff, when he succeeded to the property, had, with full knowledge of the imperfection of the leases, and in consideration and in consequence of the defendants agreeing to continue tenants, consented to leave them undisturbed, that would have amounted not to a confirmation of the lease, because he could not confirm for those who stood behind him, but to an agreement by which I should have held him bound for his life, if the leases continued so long. But it is plain that this plaintiff during the receipt of the rent was wholly unaware of the imperfection of the leases. The plaintiff, however, ought to have looked into his rights, and as by his negligence to obtain information with respect to them and to assert them, the lessees may have been led to expenditure on the premises, the benefit of which they will now lose, I shall not direct an account beyond the filing of the bill, nor shall I give the plaintiff costs." That again proceeds upon the ground that the case was an exception and not coming within the general rule, that the party ought to have been more alive to his interest, and that he, by lying by, had led parties to expect, or to act upon the notion that they had this property which he alone might have disturbed and did not disturb, and so he might have led parties into an expenditure; and therefore Sir J. Leach thought it unjust that he should have any account beyond the filing of the bill. That was still an exception.

Then, there is another case which came on two years afterwards, of *Edwards v. Morgan*, before Alexander, C. B. That will be found to be entirely an exception. That was the case of certain leaseholds to which a Mrs. Jones was entitled absolutely on her second marriage with Thomas Thomas; and, upon that occasion, she assigned the leasehold property to trustees to secure certain charges, and, subject to those charges, in trust for Thomas Thomas; and, after the death of either, then to the survivor. The marriage took effect. She survived. She had three daughters, and, by her will, she gave the whole of the property to one of her daughters, Margaret; and Margaret married Mr. Edwards. Edwards thinking (it does not exactly appear how or why) that he was not entitled, but that the other brothers and sisters were, and having entered on the property as executor, he put the other parties into possession of the property. He then found afterwards it was his own; that is, his wife was dead, and he represented her; and, under those circumstances he filed a bill to establish a title. There was some question whether there had been an election or not; but, finally, the plaintiff established the title to this property; and so the Lord Chief Baron decreed. "Then (says the Lord Chief Baron) comes the question relating to the rents and profits, and I am of opinion that the plaintiff is only entitled to the rents and profits from the time of filing the bill. I apprehend that to be the practice and the rule of the court in such cases." What the Chief Baron says,

in effect, is: 'You, Mr. Edwards, yourself put the parties into possession: you are not estopped from asserting your title afterwards; but if you put the parties into possession, and you afterwards file a bill to turn them out, on the ground that you are entitled to possession, although I think you are right, and I will establish your possession, yet I will not give you an account of the rents during the term you put them in possession;' and he refers to the case of *Pettward v. Prescott* as an authority for that. That is founded on extremely good sense. The proposition that any one having put a party into possession saying as much as this: You may take possession of the estate because it is yours, — and then that, ten years afterwards, the party who had done this might file a bill and turn them out, and make them account, would be an extraordinary proposition. There, again, the analogy of law holds, because I cannot bring an action against a party, who is a mere tenant at will, for trespass for mesne profits until I have given him notice to go out, and I have demanded possession. That, I suppose, is what the learned counsel in that case meant when he asked for an account from the time of demanding the estate. Therefore, in that case also, as well as others to which I have adverted, the general principle was clearly recognized, and the account was limited to the short period of filing the bill, only on the ground that there were special circumstances which took it out of the general rule.

Then, there were two other cases referred to. One was the case of *The Attorney-General v. The Corporation of Exeter*, which I do not think has any particular bearing on this case, for that was a bill against certain trustees of a charity to account for charity funds, upon the ground that they had been throughout erroneously applied, and the court would not give a decree except from the time of filing the bill, on the ground that it would be the height of injustice towards trustees who, it was not pretended, had misapplied the funds in the sense of misappropriating any thing, but had applied them in a different course of charity from what they ought to have done. Under those circumstances, Lord Eldon (I think it was) said the course of the court was not to visit trustees with bygone rents, but only to make them account from the time when they were called upon to account, and the error was pointed out.

The only other case was a case before the late Master of the Rolls, Lord Langdale, of *Clarke v. Yonge*. That was a case in which there was a rector of a parish and a portioner of a parish. A half of the tithes belonged to the rector, and a half to the portioner; but the two tithes became united in the same person. In that state of things, the tithe commutation took place. Then, there was one gross sum allotted for the tithes, but the tithe of the portioner and the tithe of the rector afterwards came to be severed, and the question was, whether this court could not find the means of setting right the great injustice that would otherwise be done if there was no remedy in this court; namely, that the rector would go off with the whole of the tithes, half of which belonged to the portioner. Lord Langdale held that there was jurisdiction to set that right, and decreed accordingly. But, then,

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Hicks v. Sallitt.

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Lord Langdale said, just on the same principle that operated on the mind of the Chief Baron in that case of *Edwards v. Morgan*, I shall not give you any account of the bygone tithes; you have created all the embarrassment; you have put the parties in such a situation that they went on very naturally to receive the tithes until the time when you asserted your title. I shall give you no account at all. And, indeed, Lord Langdale took the strong course of not only giving them no bygone rents and depriving them of the costs, but of actually making the plaintiff pay the costs of the suit, because he said the defendants very properly might say, I will not give up this until I am compelled to give it up, and until it is adjudicated against me. I own I do not quite follow that latter view of the case. Perhaps further investigation might make it appear to be all right; but I only refer to that to show the way in which Lord Langdale considered it.

Now, if those were all the authorities, it seems to me that they are perfectly uniform. Lord Hardwicke lays down the law distinctly in *Dormer v. Fortescue*; and all the cases that have been relied upon, as showing that a different principle has been acted upon, have all gone upon the ground that there were special circumstances that put the case out of that general principle. I say all the cases; but, undoubtedly, that case of *Drummond v. The Duke of St. Albans*, has an aspect of considerable difficulty. In that case, the proceeds of an office, I think of registrar of this court, were assigned to certain trustees for George Duke of St. Albans, and, on his death, the person who was not the party entitled to it, took possession. He was in receipt of the rents. They, in truth, belonged to the infant plaintiff. However, they were received by the other parties, they supposing that they went with the title. Under these circumstances, the infant plaintiff filed a bill for an account and to establish his title. Lord Loughborough decreed an account. Then the question arose as to the period of time for which he should have the account. In that case, I think, Lord Loughborough states the rule perfectly correctly, but the question is, whether it was applied rightly. I am not clear that it was not; but if it was, it was only applied rightly because it is inapplicable to the present case. What Lord Loughborough says is, there ought to be no decree beyond that which the party would have had at law. That, I think, is very correct. The question is, from what time would the party be entitled to an account at law? There is no doubt that, in the present case, the party would have had the value of the rents at law from the time his title accrued. If there be not something to explain that decision, then, I confess, I cannot conceive that that case squares with the other authorities. No doubt the duke ought not to have had an account for a longer period than he could have had the value at law, from the time his title accrued. I confess, that if this case cannot be explained by some doctrine of that sort, I do think it does not square with the other authorities, and cannot be considered as law. It is inconsistent with what was said by Sir William Grant, by Alexander, C. B., by Sir John Leach, and by Lord Langdale; and if I am to decide between the two, I must decide in favor of that long string of authorities and against the authority of Lord Loughborough.

I cannot understand how any limitation of the right of an infant can be introduced on the doctrine of laches. An infant files his bill, and, in this case, within a twelvemonth after he comes of age. There was no laches. What is there to prevent him from having the same right in equity as he would have had at law, namely, an account of the rents and profits during the whole period that his title has accrued?

I confess I come to this conclusion against my own wishes, (if a judge can have wishes upon a case,) because undoubtedly one feels it as a hard case. No doubt there was no fraud here, but we must merely look at what the rights of the parties are. The defendants held the estate with full notice on their title deeds that it was the estate of the infant. Having done, so, they must abide the consequences and account for the rents and profits during the period that they so held.

I am authorized to say that I have had an intimation from the Lord Justice, Knight Bruce, and he takes the same view.

TURNER, L. J. The sole question reserved in this case was whether the account of rents which has been carried back to the year 1831, when the plaintiff's title accrued, ought to have been limited to any less remote period? It was insisted by the defendant that it ought not to have been carried back beyond the filing of the bill, or at all events for more than six years before that date; and many cases were cited in support of the position, that the former of these limits ought to have been adopted under the circumstances of the present case. I have carefully examined the cases which were referred to, and very many others bearing upon this question, and I think that they may fairly be said to establish the general position that in cases of adverse possession, where there is no trust, no infancy, no fraud, no suppression; where, in short, there is a mere *bonâ fide* adverse possession, it is not according to the course of the court to carry back the account of rents beyond the filing of the bill. The general rule is so laid down by Lord Eldon in *Pulleney v. Warren*, 6 Ves. 93, and by Alexander, C. B., in *Edwards v. Morgan*. The rule, therefore, admits of no doubt; and it is important only with reference to the present case to observe the reason on which the rule is founded. Lord Eldon thus states the reason: "It is the party's own fault that he did not file the bill sooner;" and the cases which furnish us with instances of the exception to the rule lead us to the same conclusion as to the foundation on which the rule is rested. This was remarked by Sir W. Grant, in *Pettivard v. Prescott*. Lord Hardwicke, in *Dormer v. Fortescue*, states the case of trust as one in which the account will be carried back, but at the same time adds that even in such a case it will, under special circumstances, be limited to the time of filing the bill, and specifies default or laches in the plaintiff as one of the instances in which it will be so limited; and in *Pettivard v. Prescott*, itself a case of constructive trust, the account was limited to the time of the bill being filed, upon the very ground of delay. In *Forder v. Wade*, 4 Bro. C. C. 521; another case of equitable title, the account was limited to the time of filing the bill, as I have no

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Hicks v. Sallitt.

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doubt upon the ground of delay, although the marginal note refers to the doubt upon the title as the reason of the limit. So again, cases of fraud and suppression furnish exceptions to the general rule, as was laid down in *The Duke of Bolton v. Deane*, Prec. in Chanc. 516; *Bennet v. Whitehead*, 2 P. Wms. 644; *Dormer v. Fortescue* and *Townshend v. Ash*, 3 Atk. 336. But in *Pickett v. Loggon*, a case of fraud, the account was directed only from the time of the bill being filed upon the ground of the delay in proceeding. It appears, therefore, that both the general rule and the exceptions to the rule are governed by the same principle.

It is to be considered, then, how the question stands in the case before us, in which the plaintiff was an infant when his title accrued, and there is no ground for imputing delay since he attained twenty-one. That infancy takes the case out of the general rule, admits, I think, of no doubt. It is so laid down in *The Duke of Bolton v. Deane*, in *Dormer v. Fortescue* and in *Pettward v. Prescott*; and the question therefore is, whether in cases of infancy, where there has been no delay after the infant has attained twenty-one, the exception ought to be limited so as to cut down the account to the time of the bill being filed. Upon principle, I think that such a limit could not be maintained; for the delay which is the foundation of the limit in other cases cannot be imputed to infants. The rights of infants ought not to be prejudiced by the neglect of others to assert them. It was said, however, that the case of *Drummond v. The Duke of St. Albans* warranted the imposition of such a limit; but that case does not appear to me to govern the present. In that case, the name of the duke, with whom the question arose, had, as I presume, been inserted in the grant without his knowledge, and the grant had passed to the mortgagee. It was a case, therefore, in which there was infancy on the one side, and a perfectly *bond fide* adverse possession on the other; but without meaning to cast any imputation whatever upon this defendant, I think that his possession cannot be said to have been a perfectly good *bond fide* adverse possession. *Bond fide* adverse possession is thus defined by Lord Hardwicke, in *Dormer v. Fortescue*: "Where a man shall be said to be *bond fide* possessed, is where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title; which could not be here, as Fortescue had all the deeds and the very settlement on which the title depends;" and, applying this test to the present case, I think that the possession of this defendant cannot be said, within the meaning of the cases, to have been a *bond fide* adverse possession.

I am of opinion, therefore, that admitting the case of *Drummond v. The Duke of St. Albans* to be good law, this case is distinguishable from it; but I confess that I feel great difficulty upon it. According to the law of this court, whoever enters upon the estate of an infant, is held to have entered as a bailiff or guardian; *Morgan v. Morgan*, 1 Atk. 489, and *Dormer v. Fortescue*; and the rule has been carried so far that, even in a case where an adverse judgment at law had been recovered against an infant upon a purely legal title, this court entertained a bill by the infant to get back the estate, and sent the ques-

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Lowe v. Thomas.

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tion to be again tried at law. *Lord Newburgh v. Bickerstaffe*, 1 Vern. 295. It is to this rule Lord Hardwicke refers, in *Dormer v. Fortescue*, as the ground of the account being carried back in cases of infancy. The subsistence of the rule thus created by the entry, seems to draw with the right to the back account; and if the relation was to be held to have subsisted where there is possession under an adverse judgment recovered at law, I think it difficult to say, that it ought not to have been held to have subsisted where the possession was taken by mistake.

The remaining question in this case is, whether the account ought to have been limited to the period of six years before the filing of the bill. It was contended on the part of the defendant, that this limit ought to have been imposed with reference to the provisions of the statute of limitations. But it does not appear to me that this case can be brought within the range of any of those statutes. According to the construction put, and, as I think, rightly put, by the Court of Exchequer, in *Grant v. Ellis*, 9 Mee. & W. 113, upon the statute 3 & 4 Will. 4, c. 27, this is clearly not a suit for the recovery of rent within the meaning of the earlier sections of that statute. Nor can it, as I think, be considered as a suit for the recovery of arrears of rent within the meaning of the 42d section of the same statute. It is, indeed, no more than a suit by an infant, attaining twenty-one, against his guardian for an account; and the provisions of the above-mentioned statute do not appear to me at all to affect such a suit. If any statute of limitations could be brought to bear upon the case, I think it would be the statute of James, by analogy to the action of account referred to in that statute. There, is indeed, authority for this in *Lockey v. Lockey*, Prec. in Chanc. 518, where the statute was held to be a bar to such a suit as the present, brought more than six years after the infant had attained twenty-one; but unfortunately this analogy will not assist the defendant's case, for the statute of James saves the case of infancy.

I am of opinion, therefore, that this decree must stand as to the account as well as in all other respects.

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LOWE v. THOMAS.

May 30, 1854.

*Will, Construction of—"Money."*

A testatrix gave to A B, "the whole of my money" for his life, at his death to be divided between C D, and E F, and after giving her clothes, watch, and trinkets to C D, and E F, declared that the longest survivor of C D, and E F, was "to become possessor of the whole money." At her death, the testatrix was entitled to sums of stock, and to some small sums of money:—

*Held*, that the sums of stock did not pass to C D, and E F, under the above bequest.

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Lowe v. Thomas.

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THE facts of this case are fully stated in the report before Wood, V. C., 23 Law J. Rep. (N. S.) Chanc. 423; s. c. 23 Eng. Rep. 384. The plaintiff appeared.

*Hardy* argued the case for the plaintiff, and cited, in addition to the cases cited below, *Legge v. Asgill*, Turn. & R. 265, n.; *Rogers v. Thomas*, 2 Keen, 8.

*Chandless* and *Mackeson*, for next of kin in the same interest as the plaintiff.

*Walker* and *Hall*, for next of kin adverse to the plaintiff, cited and relied upon *Gosden v. Dotterill*, 1 Myl. & K. 56; *Wildman v. Wildman*, 9 Ves. 177; *Willis v. Plaskett*, 4 Beav. 208; *Boys v. Morgan*, 3 Myl. & Cr. 661; *Parker v. Marchant*, 1 You. & C. C. C. 290; s. c. 1 Ph. 356.

*Fischer*, for the administrator with the will annexed.

*Rolt*, in reply.

KNIGHT BRUCE, L. J. "Non aliter à significatione verborum recedi oportet, quam cum manifestum est, aliud sensisse testatorem;" (Dig. 32; 1; 69;) so said Marcellus, and the Vice-Chancellor's decree appears to me to be the correct result of an accurate application of that rule, there being here a total absence of context to show that the testatrix employed the word "money" otherwise than in its correct and proper use, which use is to designate, not property generally, but a particular species of property, and that species no more includes annuities than houses or furniture. An annuity is not, though its fruit is, money; nor, when a man gives his wool, or his apples, are we to presume that he means to give his sheep or his orchard? That this lady herself, if she could be applied to, would not overrule the judgment, I am far from being equally clear about. The numerous class of persons who, in wills and otherwise, carry into practice the theory that the office of language is to conceal the thoughts, are not entitled to complain if taken at their word and treated as meaning what they say.

TURNER, L. J. It is very possible, and perhaps probable, that it was the testatrix's intention to pass by the description "the whole of my money," something more than what strictly and literally speaking would pass under the description of "money;" but it is one thing to act upon a possibility or probability, and another to arrive at a judicial certainty upon that question. Now, the first question, as Mr. Hall very accurately put it, is this: could it be the intention of the testatrix by those words to pass the whole of her property? Are they tantamount to a description of the whole of her estate? It appears to me to be clear upon the context of the will that this could not be the intention, because we find in the will, after the disposition of the whole of the testatrix's money, a disposi-

tion of her clothes, watch, and other things, and this not by way of exception out of the disposition of the whole of her money previously made. It is clear, therefore, that the whole of the residuary estate cannot have been intended to pass under the description of "money." Then, can it be said that under that description she intended to pass property producing income? To determine this, we must consider what are the various sources from which income may be derived. Put the case of property invested in a ship instead of in the funds, could it be said that the ship, which is one only of the numerous forms of investment producing income, would pass? I think it clearly would not. If, therefore, a difference is to be made in the construction merely on the ground of the character of the investment in which the property which is to pass exists, or, in other words, if you deviate at all from the strict interpretation of the words which the testatrix has used, you become involved in a difficulty upon the question of the extent to which the deviation is to be carried. I think, therefore, that in this and other like cases, the proper principle to adopt is to adhere to the proper and peculiar sense of the words used in the will, where there is no context which can impose a different sense upon them. The context we have here to look at, rests entirely on the words "the whole of my money," coupled with the disposition in the remainder as "the whole money." But the words "my money" afford to my mind no indication that she intended more than money strictly speaking, because the testatrix may have had money under different circumstances. She might have money at her banker's, or money deposited with other persons, and she might doubt whether if she said "my money" simply, and not "the whole of my money," the gift might not be confined to money in her actual possession. Then is there any thing in the residuary disposition contained in the will which can have the effect of passing more than what was strictly money? I think not; for it cannot, I think, be reasonably maintained that the construction is to be varied merely on the ground that the act of the court consequent upon the disposition produces an investment of the subject of the bequest. Therefore, in giving her whole money in remainder, the testatrix must be considered as giving the same thing as she had previously given to the tenant for life, and which the court, in consequence of the act of the testatrix disposing of it in that way, directs to be invested in bank annuities. Then, is there any thing more to justify the construction, which would be desirable as probably fulfilling the intention of the testatrix, that the word "money" passes the stock in question? The only case among those cited which appears to give support to such a construction was that of *Lynn v. Kerridge*, West, temp. Hardw. 172; but on looking closely at that case, it appears that there was there a gift of a legacy which was a charge of course on the general estate of the testator, and then an ultimate disposition of all money not therein otherwise disposed of. I think that sufficiently distinguishes that case from the present; and, entirely concurring with my learned brother and the Vice-Chancellor, I am of opinion that this appeal should be dismissed.

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Hope v. Threlfall.

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HOPE v. THRELFALL.<sup>1</sup>

March 14, 1854.

*Practice — Chancery Amendment Act — Vivâ Voce Examination of Witnesses — Evidence of a Party to the Cause on Appeal not before the Court below.*

The court of appeal has jurisdiction, under the 39th section of the statute 15 & 16 Vict. c. 86, to require the production and examination before itself of a party to a cause, although he may not have been orally examined in the court below.

The expression "upon the hearing" in the 39th section, means "whenever or wherever a cause is heard."

THIS was a suit instituted by the assignees of a bankrupt to set aside a settlement made by him prior to the bankruptcy.

At the hearing, before Vice-Chancellor Stuart, he dismissed the bill. There was no oral examination of witnesses on that occasion, nor did any of the parties to the suit give evidence in the cause.

*Bacon, Malins, Daniel, Osborne, Shee, and Hamilton Humphreys,* were counsel for the several parties.

Soon after the case upon appeal had been opened,

KNIGHT BRUCE, L. J., said: It appears to me, and I believe also to my learned brother, that it is necessary for the purposes of justice that one of the parties, at least, to this suit should be examined, and, possibly, other witnesses. This court has, I believe, always decided that it has authority to examine witnesses orally, although they may not have been examined in the court below.

The cases of *Langford v. May*, 22 Law J. Rep. (N. S.) Chanc. 978; s. c. 21 Eng. Rep. 443, and *Martin v. Pycroft*, in a note, same page, were mentioned as cases wherein the court of appeal had so decided. In the former, no witness was a party to the suit, but in the latter two witnesses were parties.

The 39th section of the statute of the 15 & 16 Vict. c. 86, enacts, that "upon the hearing of any cause" the court "may require the production and oral examination before itself of any witness, or party in the cause;" and it was argued that "hearing" was confined to the original hearing, and did not refer to a "rehearing" on appeal.

KNIGHT BRUCE, L. J. We think that an inquiry must take place, and that it must consist either wholly or in part of the oral examination of Mr. W. C. Threlfall, (one of the parties to the suit,) before

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<sup>1</sup> This case is reported on another point of practice, 23 Law J. Rep. (N. S.) Chanc. 33; s. c. 23 Eng. Rep. 193.

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Attorney-General v. Chambers; Attorney-General v. Rees.

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ourselves, or must be preceded by such examination. Nothing remains at present to be done but to settle the time at which such examination can conveniently be proceeded with.

TURNER, L. J. I shall only add a few observations on the act of parliament. According to the true construction of the 39th section of the chancery amendment act, I think that it is competent to the court on the rehearing of a cause, to direct the oral examination of witnesses before itself. I think that the word "hearing" in that section is used not in its technical but in its general sense, and that "upon the hearing" means whenever and wherever a cause is heard. I think so for this reason; that if the word "hearing" is to be taken in its strict sense, the court below would have the means of knowing the demeanor of the witness and the court of appeal would not. Now, the object of the section is to afford the means of satisfying the conscience of the court. I think it is absolutely necessary that there should be an examination of this gentleman, without in the least saying what the result of that examination may be.

The case came on on the 24th of April, when, as had been arranged, each side examined witnesses, and Mr. W. C. Threlfall was himself examined.



ATTORNEY-GENERAL v. CHAMBERS. ATTORNEY-GENERAL v. REES.<sup>1</sup>

June 6, and July 1 and 15, 1854.

*Sea-Shore — Jus Coronæ — Ordinary Tides.*

The right of the crown to the sea-shore is limited by the line reached by the average of the medium high tides between the spring and the neap, in each quarter of a lunar revolution during the whole year.

THIS was an information by the attorney-general against the defendants, the owners and occupiers of certain lands in the parish of Llanelly, in the county of Carmarthen, South Wales, and which lands were contiguous to the shore of an arm of the sea called "the Bury River," and near to the harbor of Llanelly; and it stated that, about thirty years ago, there were erected, without the license of the crown, partly on some of these lands and partly on the sea-shore in front thereof, extensive buildings and works for the purpose of carrying on the business of copper smelting; and subsequently to such erections there was raised on the sea-shore in front of such lands an extensive embankment, running out a considerable way into the harbor of Llanelly, by means of which parts of the harbor were silted up, and por-

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<sup>1</sup> Before the Lord Chancellor, (LORD CRANWORTH,) ALDERSON B., and PARKE, B.

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tions of the Bury River, which were formerly covered by the sea at ordinary high tides, had in consequence become either permanently dry or only covered at extraordinary high tides; that the defendants had not only raised coal from the said lands, but had extended their workings under the sea-shore to the seaward of high-water mark, and had dug up and carried away from such parts of the veins and seams of coal as lie under the said sea-shore, large quantities of coal, &c.; and that the defendants justified their acts on the ground that their building, embankments, and pits or mines, were situated above the high-water mark at neap tides; and that the right of the crown to the sea-shore did not extend beyond that part which lies to the seaward of such high-water mark at neap tides. The information charged that the right of the crown to the sea-shore extended landward as far as the high-water mark at ordinary monthly spring tides; or, at all events, far beyond the high-water mark at neap tides, and up to the medium line of high-water mark between neap and spring tides; and that the said embankments were encroachments upon and nuisances in the port of Llanelly; that in consequence of such embankments, &c., the ancient bounds and limits of Bury River and of the banks and shores thereof, and the line and boundary of high-water mark of the flowing of the sea there at high tides, had become obliterated, confused, and concealed. The information prayed that the right of the crown to the said sea-shore below high-water mark might be established and declared; and that the boundary, or mark to which the sea flowed, at high water at ordinary high tides, upon the shore adjoining the lands of the defendants, before the said embankments, &c., were erected, and also those portions of the mines which lie under land belonging to the crown might be ascertained and distinguished; and that, if necessary, a commission might issue for that purpose; and for an account of the rents and profits arising from the buildings, &c., and the working of the mines; and for an injunction and a receiver.

The cause came on for hearing, before the Master of the Rolls, in January, 1852, when certain issues were directed (among other things) as to the right of the crown to the sea-shore; but it was ultimately arranged between the parties that the cause should be removed from the paper of the Master of the Rolls to the paper of the Lord Chancellor, to be heard before his lordship, assisted by two of the common law judges, upon the following points: first, whether the title of her Majesty, *jure Coronæ*, to the bed and shores of the sea, and of navigable rivers within the realm, extends to and is limited by either, and, if so, by which of the following boundaries, (that is to say:) 1. The line of high water which is reached by ordinary spring tides, that is to say, the said tides other than the high or equinoctial spring tides. 2. The line of high water which is reached by taking an average of the height of all the tides throughout the year. 3. The line of high water up to which the tide flows more frequently throughout the year than to any other given line. 4. The line of high water of the lowest neap tide, and up to or over which the water flows at every tide throughout the year. In other words, what is the proper boun-

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dary line of the tide which, in law, determines the right of the crown to the sea-shore?

*James and Hanson, (absente The Solicitor-General),* for the crown, contended, that the right of the crown was limited by the ordinary high-water mark reached by the average monthly spring tides; for that must be the meaning of the land between the ordinary high and low-water mark in the treatise of Lord Hale, *De Jure Maris*, pp. 12, 25, 26;<sup>1</sup> and that the doctrine of accretion implied that the crown was entitled up to the spring tides.

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<sup>1</sup> The passage cited from Lord Hale's treatise "*De Jure Maris et Brachiorum ejusdem*," p. 12, is as follows: "The next evidence of the King's right and propriety in the sea and the arms thereof is his right of propriety to the shoar and the *maritima incrementa*. (1) The shoar is that ground that is between the ordinary high-water and low-water mark. This doth *primâ facie* and of common right belong to the king, both in the shoar of the sea and the shoar of the arms of the sea; and herein there will be these things examinable: 1. What shall be said the shoar or *littus maris*. 2. What shall be said an arm or creek of the sea. 3. What evidence there is of the king's propriety thereof. For the first of these, it is certain that that which the sea overflows, either at high spring tides or at extraordinary tides, comes not as to this purpose under the denomination of *littus maris*, and, consequently, the king's title is not of that large extent, but only to land that is usually overflowed at ordinary tides; and so I have known it ruled in the Exchequer Chamber in the case of Vanhaesdanke, on prosecution by information against Mr. Whiting, about 12 Car. 1, for lands in the county of Norfolk, and accordingly ruled 15 Car. 1, B. R. Sir Edward Heron's case, and Pasch. 17 Car. 2, in *Scaccario*, upon evidence between the Lady Wansford's lessee and Stephens, in an *ejectione firmæ* for the town of Cowes in the Isle of Wight. That, therefore, I call the shoar that is between the common high-water and low-water mark, and no more. (2) For the second, that is called an arm, &c. (3) For the third, it is admitted that, *de jure communi*, between the high and low-water mark doth *primâ facie* belong to the king, 5 Rep. 107, Constable's case, Dyer, 236. Although it is true that such shoar may, and commonly is, parcel of the manor adjacent, and so may be belonging to a subject, as shall be shown, yet *primâ facie* it is the king's." And in pages 25 and 26, of the same treatise, he proceeds: "1. The shoar of the sea. There seem to be three sorts of shoars, or *littora marina*, according to the various tides, viz: 1st, the high spring tides, which are the fluxes of the sea at those tides that happen at the two equinoctials, and certainly this doth not, *de jure communi*, belong to the crown; for such spring tides many times overflow ancient meadows and salt marshes, which yet unquestionably belong to the subject. And this is admitted on all hands. 2. The spring tides which happen twice every month, at full and change of the moon; and the shoar in question is, by some opinion, not denominated by these tides neither; but the lands overflowed with these fluxes ordinarily belong to the subject *primâ facie*, unless the king hath a prescription to the contrary. And the reason seems to be, because, for the most part, the lands covered with these fluxes are dry and maniorable, for at other tides the sea doth not cover them; and therefore, touching these shoars, some hold that common right speaks for the subject, unless there be an usage to entitle the crown; for this is not properly *littus maris*: and therefore it hath been held that where the king makes his title to land as *littus maris*, or *parcela litoris marini*, it is not sufficient for him to make it appear to be overflowed at spring tides of this kind. P. 8 Car. 1, in *Camera Scaccarii*, in the case of Vanhaesdanke for lands in Norfolk, and so I have heard it was held P. 15 Car. B. R. Sir Edward Heron's case, and 17 Car. 2, in the case of the Lady Wansford, for a town called the Cowes in the Isle of Wight, in *Scaccario*. Ordinary tides or nepe tides, which happen between the full and change of the moon; and this is that which is properly *littus maris*, sometimes called *marettum*, sometimes *warettum*; and, touching this kind of shoar, namely, that which is covered by the ordinary flux of the sea, is the business of our present inquiry."—*Hargrave's Collection of Tracts relative to the Laws of England*, Vol. I.

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[The LORD CHANCELLOR. That is assuming that the accretion must take place at high-water mark.]

They cited, also: *The Attorney-General v. Parmeter*, 10 Price, 378; Anonymous, 3 Dyer, 326, b; *Smith v. The Earl of Stair*, 6 Bell's Appeal Cases, 487.

*Palmer, Goldsmid, and Mellish*, for the defendants. The shore belongs to the crown, on the ground that it is part of the unappropriated wastes of the kingdom; but the reason will not apply where land is only occasionally invaded by the sea, because it is capable of occupation the greater part of the year. The ordinary bi-monthly spring tides cannot give the limit, for they occur only twenty-six times in a year. "Ordinary," means usual and uniform, and the neap line, which is covered with the tide every day, would best answer the definition.

[ALDERSON, B. Then "ordinarily" and "always" mean the same thing.]

Lord Hale excludes all "high spring tides," and says that land, covered only by the bi-monthly spring tides, ordinarily belongs to the subject, and that so it has been adjudged. In his third division, he treats "ordinary or nepe tides" as synonymous. "Neap" means the lowest or dead neap. Todd's Johnson's Dictionary, *in verbum*. *The Attorney-General v. Parmeter*, has no bearing upon the case, for there the question was, whether the crown could so grant the *littus maris* as to create a nuisance. In *Blundell v. Catterall*, 5 B. & Ald. 268, Mr. Justice Holroyd says, that the rule of the civil law as to the shore does not prevail in this country. In *Lowe v. Govett*, 3 B. & Ad. 862, the subject was held entitled to the shore that was only covered by the ordinary spring tides. They cited, also: *The King v. Lord Yarborough*, 2 Bli. N. S. 147; s. c. 5 Bing. 163; *In re Hull and Selby Railway*, 5 Mee. & W. 327.

*James*, replied.

July 1. ALDERSON, B. In this case, in which your lordship has requested the assistance of my brother Maule and myself, I am now to deliver our joint opinion on the only question argued before us. That question, as I understand it, is this: What, in the absence of all evidence of particular usage, is the limit of the title of the crown to the sea-shore? The crown is clearly, in such a case, according to all the authorities, entitled to the *littus maris* as well as to the soil of the sea itself adjoining the coasts of England. What, then, according to the authorities in our law, is the extent of this *littus maris*? This, in the absence of any grant, or usage from which a grant may be presumed, is, according to the civil law, defined as the part of the shore bounded by the extreme limit to which the highest natural tides extend: "quatenus hybernus fluctus maximus excurrit;" that is, the highest natural tide; for, according to Lord Stair's exposition, the definition does not include the highest actual tide, for these may be produced by peculiarities of wind or other temporary or accidental

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circumstances, concurring with the flow produced by the action of the sun and moon upon the ocean. But this definition, even thus expounded by the authorities of the civil law, is clearly not the rule of the common law of England. Holroyd, J., no mean authority, in his very elaborate judgment in the case of *Blundell v. Catterall*, mentions this as one of the instances in which the common law differs from the civil law, and says that it is clear that, according to our law, it is not the limit of the highest tides of the year, but the limit reduced by the highest ordinary tides of the sea, which is the limit of the shore belonging, *primâ facie*, to the crown. What, then, are these highest ordinary tides? Now, we know that, in fact, the tides of each day differ, in some degree, as to the limit which they reach. There are the spring tides at the equinox, the highest tides of all. These clearly are excluded in terms by Lord Hale, both in page 12 and in page 26 of his treatise, *De Jure Maris*, for though, in one sense, these are ordinary, that is, according to the usual order of nature, and not caused by the accidents of the winds and the like, yet they do not ordinarily happen, but only at two periods of the year. These, then, are not the tides contemplated by the common law, for they are not ordinary tides, not being of common occurrence. This may, perhaps, apply to the spring tides of each month, exclusive of the equinoctial tides; and, indeed, if the case were without distinct authority upon this point, that is the conclusion at which we might have arrived. But, then, we have Lord Hale's authority, in page 26 of *De Jure Maris*, who says: "Ordinary tides, or nepe tides, which happen between the full and change of the moon, are the limit of that which is called *littus maris*;" and he excludes the spring tides of the month, assigning as the reason, that the lands beyond them are, for the most part of the year, dry and manurable; that is to say, not reached by the tides. And to the same effect is the case of *Lowe v. Govett*, which excludes the monthly spring tides also. But we think that Lord Hale's reasoning may guide us to the proper limit. What, then, are the lands which, for the most part of the year, are reached and covered by the tides? The same reason that excludes the highest tides of the month which happen at the springs, excludes the lowest high tides which happen at the neaps; for the highest or spring tides and the lowest high tides (those at the neaps) happen as often as each other. The medium tides, therefore, of each quarter of the tidal period, afford a criterion which, we think, may be best adopted. It is true of the limit of the shore reached by these tides, that it is more frequently reached and covered by the tide than left uncovered by it; for about three days it is exceeded, and for about three days it is left short in each week, and in one day it is reached. This point of the shore, therefore, is about four days in every week, that is, for the most part of the year, reached and covered by the tides; and as some, not indeed perfectly accurate, construction, but approximate, must be given to the words, "highest ordinary tides," used by Holroyd, J., we think, after fully considering it, that this best fulfils the rules and the reasons for them given in our books.

We, therefore, beg to advise your lordship that, in our opinion, the

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average of these medium tides in each quarter of a lunar revolution during the whole year gives the limit, in the absence of usage, to the rights of the crown on the sea-shore.

The LORD CHANCELLOR, (LORD CRANWORTH.) I have to thank the learned judges for the trouble they have taken. It is most likely I shall arrive at the same conclusion; but it will be my duty to consider the question. The case will be in the paper for judgment this day week.

July 15. The LORD CHANCELLOR, (LORD CRANWORTH.) The question for decision in this case is, what is the extent of the right of the crown to the sea-shore? The right of the crown to the *littus maris* (whatever that means) is not disputed. The question is, what is the *littus maris*? Is it so much as is covered by ordinary spring tides, or is it something else? The rule of the civil law was: *Est autem littus maris quatenus hybernus fluctus maximus excurrit*. This is certainly not the doctrine of our law. All the authorities concur in the conclusion, that the right is confined to what is covered by "ordinary" tides, whatever be the right interpretation of that word "ordinary." By *hybernus fluctus maximus* is clearly meant extraordinary high tides; though, speaking with physical accuracy, the winter tide is not in general the highest. Land, covered only by these extraordinary tides, is not what is meant by the sea-shore. Such tides may be the result of wind or other causes independent of what ordinarily regulates the flux and reflux.

Setting aside these accidental tides, the question is, what is the meaning of "ordinary?" It is evidently a word of doubtful import. In one sense the highest equinoctial spring tides are ordinary, that is, they occur in the natural order of things. But this is evidently not the sense in which the word "ordinary" is used, when designating the extent of the crown's right to the shore. This is apparent from Lord Hale's treatise, *De Jure Maris*, pp. 12, 25, which is, in truth, nearly all the authority we have to guide us. Lord Hale says, at page 12: "The next evidence of the king's right and property in the sea and arms thereof, is his right of property to the shore, and the *maritima incrementa*. "The shoar is," &c.,<sup>1</sup> "and so I have known it ruled in" certain cases which he mentions, but which I have not been able to discover. I do not know whether they are reported. I have looked at all the indexes and references in which I thought it was likely I might find them, but I have been unable to do so. Then: "For the third, it is admitted that, *de jure communi*, between the high-water and low-water mark doth *primâ facie* belong to the king."

Then, in a subsequent passage to which reference has been made, pages 25 and 26, concerning the right the subject may have in the sea-shore, he says: "The shoar of the sea. There seem to be three sorts of shoars, or *littora marina*," &c., (*vide* note 1, *suprà*.) Then,

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<sup>1</sup> *Vide* note (1) *suprà*.

again, he refers to those two old cases, to which he referred before. Then, he says: "Ordinary tides, or nepe tides," (using those two words as synonymous,) "which happen between the full and change of the moon; and this is that which is properly *littus maris*, sometimes called *marettum*, sometimes *warettum*; and, touching this kind of shoar, namely, that which is covered by the ordinary flux of the sea, is the business of our present inquiry." Disregarding, then, these extreme high tides, we next come to the ordinary spring tides, that is, the spring tides of each lunar month. No doubt, speaking scientifically, they probably may differ, but practically these differences may be disregarded. Lord Hale gives no absolute opinion, but he evidently leans very strongly against the right to the lands covered only by spring tides, and refers to decisions which support his views. Then he describes ordinary tides as if synonymous with neap tides. This leaves the question very much at large, and there is very little of modern authority. In *Blundell v. Catterall*, Mr. Justice Holroyd says: "By the common law it, that is, the sea-shore, is confined to the flux and reflux of the sea at ordinary tides, meaning the land covered by such flux and reflux." Still, the question remains, what are ordinary tides? The nearest approach to direct authority is *Lowe v. Govett*. There, certain recesses on the coast covered by the high water of ordinary spring tides, but not by the medium tides between spring and neap tides, were held not to pass under an act of parliament, which vested in a company an arm of the sea daily overflowed by it. Lord Tenterden held that these recesses were not ordinarily overflowed by the sea, which shows clearly that he did not consider the overflowing by ordinary spring tides to be what is meant by ordinarily overflowing; and both Mr. Justice Littledale and Mr. Justice, now Baron, Parke concur in saying, that the recesses in question were above ordinary high-water mark; clearly showing their opinion to be, that what is meant by ordinary high-water mark is not so high as the limit of high water at ordinary spring tides. There is, in truth, no further authority to guide us; for the question did not arise in either of the cases in 10th Price, (*The Attorney-General v. Burrige*, 10 Price, 350; and *The Attorney-General v. Parmeter*), as to the buildings at Portsmouth. In this state of things, we can only look to the principle of the rule which gives the shore to the crown. That principle I take to be, that it is land not capable of ordinary cultivation or occupation; or, according to the description of Lord Hale, as generally dry and manurable; and so it is in the nature of unappropriated soil. Lord Hale gives as his reason for thinking that lands only covered by the high spring tides do not belong to the crown, that such lands are for the most part dry and manurable; and, taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is, that the crown's right is limited to lands which are, for the most part, not dry or manurable.

The learned judges, whose assistance I had in this very obscure question, point out the limit indicating such land as the line of the medium high tide between the springs and the neaps; all lands below that line are more often than not covered at high water, and so may

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justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line; and I, therefore, concur with the able opinion of the judges, whose valuable assistance I had, in thinking that that medium line must be taken as the boundary of the right of the crown. I cannot give any further direction at present.

The *Solicitor-General*. Will your lordship permit me to observe, in order that there may be no misapprehension, that I take the decision to be this, that the *medium filum* is to be the *medium filum* of all tides throughout the year—that is, including the spring tides, the equinoctial tides, as well as the other.

The LORD CHANCELLOR. Yes.

*Palmer*. And ordinary tides.

The LORD CHANCELLOR. I call for that purpose ordinary, the ordinary equinoctial. I do not include in that any thing that we sometimes hear of, when all the marshes are overflowed by some extraordinary operation of wind and tide.

## HOPE v. HOPE.

June 3, 5, and 7, and August 5, 1854.

*Custody of Infants—Jurisdiction—Wards of Court—Mother and Infant Children residing abroad—Substituted Service.*

In 1836, H., a British subject, intermarried with E., a native of France, and the parties resided in Paris. There were five children of the marriage, who were all born in France. In 1853, the husband and wife separated, and the former came to reside in England. The wife continued in France, and retained two of the children, against the wishes of the husband; and in 1853, she instituted, in this country, a suit for divorce. In November, 1853, a bill was filed, in the name of the infant children, against the father and mother, to make the children wards of court. A motion was made that the mother might be ordered to deliver up the two children to the custody of the father:—

*Held*, upon appeal, confirming the decision of the court below, that the court had jurisdiction to make the order, notwithstanding the children were born abroad, and that they and their mother were resident abroad; and it was ordered accordingly.

In the divorce suit, G. and C. acted as solicitors for the wife:—

*Held*, that an order directing that service of the bill and notice of motion on G. and C. should be deemed good service on the mother, was rightly made.

THE suit in this case was instituted on behalf of Louisa A. Hope, Henrietta Hope, Adrian E. Hope, and Jean H. Hope, infants, by F. H. Dickenson, their next friend, against Alexander J. B. Hope and William Scott, trustees of a settlement under which the infant plaintiffs were interested, and Adrian John Hope and Emilie Melanie

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Matilde, his wife, the father and mother of the infant plaintiffs; and the object of the suit was to have the directions of the court as to the custody and care of the infant plaintiffs.

A motion was made in the suit, on behalf of the plaintiffs, that the defendant Emilie M. M. Hope might be ordered to deliver up the plaintiffs, Adrian E. Hope and Jean H. Hope, to the defendant Adrian J. Hope, their father, in order that they be brought to, and educated in England, under the direction of their father, or of such other person as the court should direct; and that the defendant Adrian J. Hope might be authorized to make all necessary applications to the courts in France to obtain possession of the said two infant plaintiffs for the purposes aforesaid, and that the defendant Emilie M. M. Hope might be restrained from removing or concealing the said two infant plaintiffs, and from hindering or preventing the delivering of the same plaintiffs to the defendant, Adrian J. Hope, for the purposes aforesaid.

The facts of the case were as follows: The defendant Adrian J. Hope, a native of England, and a subject of the British crown, and Emilie M. M. Hope, a native of France, intermarried on the 21st of July, 1836, and from that time to the date of their separation, resided principally at Paris. The infant plaintiffs were the sole issue of the marriage, and were all born in France; the youngest child at the time the motion was made being of the age of eight years and upwards. It appeared that in 1852 unhappy differences had arisen between Mr. and Mrs. Hope, and early in 1853 Mr. Hope sent his children over to England, and placed them under the care of his relations there, Mr. and Mrs. Hope continuing to reside in Paris. Shortly afterwards, Mr. Hope permitted his two younger children, Adrian E. Hope and Jean H. Hope, to return to their mother, in Paris, for a period of three months, upon her giving a written undertaking to restore them to their father at the expiration of that period. Mr. Hope, at the latter end of May, went over to England to visit his remaining children, and, while there, was served with a citation to appear before the court at Paris, on a suit of separation, instituted by his wife, on the ground of alleged cruelty, and in which suit she claimed the perpetual guardianship of her two sons. Mr. Hope, on his return to Paris, found that his two sons had been removed from his residence there, and the place of their abode was concealed from him. On the 9th of June, the French court gave judgment in the suit, declaring itself incompetent to decree *séparation de corps*; but with regard to measures "provisory and urgent," it was ordered that Mrs. Hope should be at liberty to retire to the convent Des Dames Augustines, and that the two sons should remain with her at the convent, and that Mr. Hope should have power to see them at all times, &c.

On the 13th of June, Mrs. Hope removed, with her sons, to the said convent, and had ever since lived separate from her husband. On the 23d of June, 1853, Mrs. Hope obtained an order from the French court, authorizing her to go with her two sons to the Pyrenees, for the benefit of the warm baths, and ordering Mr. Hope to

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pay to Mrs. Hope 20,000 francs for the expenses of the journey, &c. Mr. Hope then appealed to the *Cour Impériale* against the said two orders; and on the 22d of June the court of appeal gave judgment to the following effect: "That the husband and wife, being aliens, foreign tribunals alone are competent to pronounce in disputes, the object of which is to modify the legal conditions of marriage; but considering that it is competent to the French tribunals, when a demand of *séparation de corps* is made by a foreign woman, to provide for her wants and her safety, that it is equally competent to them to take those measures that the age and health of the children conditionally require." The court of appeal confirmed the orders of the court below; but, nevertheless, decreed that the two sons so conditionally confided to the wife, should be sent to their father on the 15th of September, 1853, "if it has not been otherwise ordered on this head by the English tribunals;" and Mr. Hope was condemned in costs.

In August, 1853, Mrs. Hope commenced proceedings in the ecclesiastical court of this country for a divorce. On the 5th of October, 1853, a further order was made by the *Cour Impériale*, which was in substance as follows: "Considering that the only question before the court is of measures provisory, &c., and that the time during which Mrs. Hope was authorized to keep her children was limited to the 15th of September only, in order to compel her to begin and follow up before the competent tribunal the demand of *séparation de corps*, and in anticipation of a decision of the rightful judges upon this point: that it appears that the suit is followed up; that a decision on the provisory measures can be obtained in four months, commencing from this day; and that it is for the interest of the children that they should remain with their mother for these four months at least, unless it has been otherwise decreed by the rightful judges before the expiration of this time;" the court decreed that the children should remain with their mother for the four months at Paris, and condemned Mr. Hope in costs.

The present bill was filed on the 11th of November, 1853.

Messrs. Grover and Coare, of the Temple, were acting as the solicitors of Mrs. Hope, in the divorce suit; and on the 22d of November, 1853, an order was made, on the motion of the plaintiffs, that service of the bill and of the notice of the present motion upon Messrs. Grover and Coare should be good service on Mrs. Hope.

The motion came on to be heard before the Master of the Rolls, when his Honor expressed a strong opinion that he had jurisdiction to make the order asked; but both parties being unwilling to go into merits, it was, with the leave of the court, arranged that the motion should be heard by the Lord Chancellor as an original motion, upon the point of jurisdiction only.

*Palmer and Amphlett*, for the motion, cited: *Beattie v. Johnstone*, 1 Phil. 17; s. c. on appeal, 10 Cl. & F. 42; *Salles v. Savignon*, 6 Ves. 572; *In re Spence*, 2 Phil. 247; *Stephens v. James*, 1 Myl. & K. 627; *Ex parte Southcot*, 2 Ves. sen. 401.

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On the point of substituted service: *Bromley v. The Bank of England*, 7 Jur. 120; *Hobhouse v. Courtney*, 12 Sim. 140; *Hunter v. Capron*, 12 Law J. Rep. n. s. Chanc. 142; *Steele v. Plomer*, 2 Phil. 780; s. c. 1 Hall & Tw. 149; *Weymouth v. Lambert*, 3 Beav. 333; *Cooper v. Wood*, 5 Ibid. 391; *Murray v. Vipart*, 1 Phil. 521.

*Stephen* appeared for the father of the children.

*The Solicitor-General, Mr. Terrell, and Mr. Wise*, for Mrs. Hope. Even if the court has jurisdiction, the order cannot be made on a bill so framed. The application must be the application of the father. The jurisdiction cannot attach where the child is abroad. *In re Taylor*, 11 Sim. 178. In *Beattie v. Johnstone*, the whole reasoning of the judgment was dependent upon the fact of the child being within the jurisdiction; for jurisdiction involves the notion of ability to enforce the order. *De Manneville v. De Manneville*, 10 Ves. 52. The French courts have remitted the question of divorce to the English tribunals, but have retained complete dominion over the rest of the case.

*June 7.* The LORD CHANCELLOR, (LORD CRANWORTH.) There are several points raised in this case. The first point which it is necessary for me to consider is, whether the parties are properly before me — whether Mrs. Hope has been properly served; and that depends upon this, whether an order that was made by the Master of the Rolls in November last, for substituting service upon Mrs. Hope by making service upon Messrs. Grover and Coare good service, was a proper order, or, if not a proper order, whether her subsequent conduct has made it a proper order, or disqualified Mrs. Hope from now objecting to it. And here I must observe that the right to direct substituted service depends now, not merely on the practice of the court, but on the 15 & 16 Vict. c. 86. s. 5. That statute expressly directs that the court may order substituted service whenever the court thinks justice requires it. I do not think that materially alters the case; because if proper, that is only an enunciation by the legislature that the practice should be what it was before. Now, regularly, service ought to be personal, if possible; if not, then by leaving it at the dwelling-house of the party. I think in that respect the doctrine of this court differs from that of courts of common law; there it must always be personal, unless under an order it is to be substituted. However here, either personal service, or service at the dwelling-house may be impossible. A defendant may be abroad, and yet it may be very unfit that he should not be litigated with as if he were here, because he might have agents competent to represent him, and actually representing him. Therefore, the question in such cases is, whether there is any such person, where a defendant is abroad, on whom the service might be fitly made, so as to treat the service upon that other person as service upon the party who is abroad.

Now this has been allowed in a variety of cases when an agent is here managing all the affairs of a defendant who is abroad, and in regular communication with him on all his affairs, or where he is

here specially managing the particular matter to which the suit in question relates. In such cases the court has felt that it may safely allow service upon that agent to be deemed good service, that is, upon the defendant abroad; because the inference is irresistible that a service so made on that agent is service upon a person, either impliedly authorized to accept that particular service, or upon a person who, it is perfectly certain, will communicate the process so served to the party who is not in this country to receive it himself. The object of all service, I need hardly say, is to give notice to the party on whom the service is made, in order that he may appear and resist that which is sought against him; so that the court may have perfect confidence that the service reached the party, and that every thing has been done that was required. Now, in this case, Messrs. Grover and Coare were the solicitors of Mrs. Hope in a proceeding which she instituted against her husband for obtaining a divorce. It appears that the French tribunals decided that the question as to the custody of the children was dependent on, or at all events that it was connected with, the proceeding. According to their rules of proceeding, a divorce, or rather a *séparation de corps*,—a proceeding very much analogous to our divorce *à mens et thoro*,—is a proceeding which carries with it the question also as to the custody of the children. I must say on that subject I think their law is much more rational than ours; however, in administering the law, I am not to make myself wiser than those who have been the lawgivers. That is not so in this country: the question of divorce does not draw with it, or in any way connect itself with, the question of the custody of the children. That is not the case in the French courts; they considered that the proceeding which had been instituted by Mrs. Hope in this country for a divorce was connected with the custody of the children, or rather that the custody of the children was connected with that proceeding. That being so, the children instituted a suit in this country, and filed the present bill on the 11th of November of last year, the sole object of which, in fact, is to cause themselves to be removed from the custody of their mother in France, to whom their custody had been temporarily confided by the French courts pending these proceedings: it was to cause themselves to be removed from the custody of the mother to the custody of the father. The suit is instituted of course by a next friend, and the application may be considered as, substantially, the application of the father, because the father appears here, and undertakes, (as I understand Mr. Roundell Palmer to say,) to find all means for their maintenance and education which the court shall think fit. There is a small sum which has been invested in the names of trustees, to give a formal sort of jurisdiction. I give no opinion whatever whether that was necessary or not; that is formal, however, because the amount would only be 30*l.* a year for the children; and therefore it is merely for the purpose of shutting out the objection that there was no property in dispute, and that consequently there might not be jurisdiction, if property in dispute be necessary to constitute jurisdiction. The father undertakes to furnish all means that may be necessary for their maintenance and education during

their minority. Now, in my opinion, under these circumstances, service upon Messrs. Grover and Coare was perfectly good service, and the order consequently made by the Master of the Rolls was perfectly right, because for this purpose you do not want to look to the form of the proceeding, but to the substance. It is true, their being Mrs. Hope's agents with reference to her divorce does not necessarily imply that they were her agents with reference to the custody of the children; not necessarily, but it is impossible not to suppose that if they were acting for her on the subject of her being separated from her husband, and as a suit for that purpose in France raises, as incident to it, a question as to the custody of the children, it is utterly impossible to suppose that these parties did not communicate with her upon that subject. But all question on that point is excluded by the evidence that there was before the Master of the Rolls, because these gentlemen said, "we will communicate with our client upon the subject;" and they do communicate with their client, and then say, "we have no instructions from her;" and the inference is irresistible, that she had perfect knowledge of all the proceedings. I think it would be *hærens in literâ*, if I had any doubt that the full knowledge of those proceedings reached Mrs. Hope the next morning after they were communicated to Messrs. Grover and Coare; there can be no doubt at all about it. Therefore, it appears to me that the order of the Master of the Rolls was perfectly right, and it is an order which, if I had been in his situation, I should have made; but it is not necessary to decide that, because, whether it was a right order or not, suppose the Master of the Rolls had *per incuriam* made an order before there was any reasonable probability that Mrs. Hope would know any thing of these proceedings to defend herself, she is a necessary party to these proceedings, and, if I recollect right, she takes an interest in the 1,000*l*. However, that is matter of form. If there were any doubt whether the order was right, or suppose by accident an order had been made before there was any reasonable probability that knowledge of the proceedings had reached Mrs. Hope, it is perfectly obvious she knew of them immediately afterwards, because, in fact, she appeared. I do not mean by "appeared," that she, in point of form, entered an appearance, but she does that which is the substance of appearance,—she files affidavits, makes two or three affidavits herself, and procures other persons to make affidavits for her; she files, I think, half-a-dozen altogether, some of them by herself, and some of them by other persons, to resist the affidavits that are filed in support of the motion, that were made conjointly with the filing of the bill. Therefore, I should be clearly of opinion that, whether the order was right or not, it is immaterial. I am clearly of opinion it was right; and if it were wrong, all the error of it was set right afterwards by the conduct of Mrs. Hope. She received the notice and waived all formality; appeared, filed her affidavits, and resisted the demand. When I say "waived," I do not mean that she does that in form; because, in fact, the appearance she enters is under protest, that is to say: "I will enter an appearance which will be a good appearance, if I have precluded myself by what took place before from objecting

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that I had not been served." Now, in my opinion, she had so precluded herself, and consequently she is to all intents and purposes a defendant here, having entered an appearance here. One circumstance was mentioned, that she is a married woman, and could not properly have entered an appearance separately from her husband, without obtaining an order for the purpose. That may be so. I do not enter into that at all. If that be a good argument, then Mr. Hope is competent to enter an appearance for her; it would, perhaps, be more proper that she should be served separately and called upon to appear. Whether that was strictly the most regular mode of proceeding it is not necessary to discuss; we are looking at the substance of the thing. Either the husband was to enter an appearance for her — and that I should consider as done now, if that be a proper course — or, if not, the husband has waived the necessity of an order, and the court has overlooked the fact that there was no order enabling her to appear separately. In point of fact she has appeared separately and contested this question, in which, substantially, the husband, though nominally a defendant and the next friend of the infants, is litigating with her the question as to who is entitled to the custody. It appears to me, therefore, upon the question of form, there is nothing in the way of deciding the present question. Mrs. Hope was either regularly served, as I believe she was, or if not regularly served, she has waived all questions arising out of any irregularity in that service. She is now here in court; and the question arises upon the present application whether or not I ought to order the children to be delivered up by her to the husband, or to make any order upon the present application. Now, that depends upon questions of some importance, which I really do not think, when looked into, involve any great difficulty. The jurisdiction of this court, (I say of the court, — probably it may be of the holder of the great seal as representing the crown, for he exercises the jurisdiction of the crown,) as to the custody of infants depends upon this, that it is the interest of the state, and of the sovereign, that children should be properly brought up and educated; and that is commonly expressed by saying that, according to the doctrine of our law, the sovereign is *parens patriæ* — that is, one who is to look to, and is bound to look to, the maintenance and education, as far as it has the means of doing so, of all the subjects of her Majesty.

The first question which has been suggested is, whether that principle applies to children born out of allegiance to the crown. I confess I cannot see any foundation for doubt; because the moment it is stated that the statute clearly establishes that a child born of a natural born subject out of the king's allegiance, is, to all intents and purposes, a British subject; of course, one incident to a British subject is, that he or she is entitled to the protection of the crown as *parens patriæ*. It seems, when once it was said by the legislature that a child of a British father born abroad is, to all intents and purposes, to be deemed as if he were born in England, and if, being born in England, the child was entitled to the protection; as a corollary, it must be entitled to the protection if born abroad, which was

the express intention of the statute. Then, if there were any necessity for authority upon that subject, I believe abundance of authority might have been found for it, but I have not myself been enabled to discover any authority as to the distinction between a subject born abroad and a subject born in this country. The only reason, I think, for there being no authority is, that, if it is only to depend upon the place of birth, there could not be any ground for doubt; and, therefore, I do not wonder that no authority has been found on the subject. But a more difficult point was raised, which was this. Putting the place of birth out of the question, it was said, how can such a jurisdiction be exercised in respect of an infant that is not, at the time the jurisdiction is asked for, within the control of the court? Now, that is an objection much more plausible than the other upon the place of birth. But I apprehend that this is immaterial. It may be that a child may be out of the jurisdiction under such circumstances that no jurisdiction can be exercised, because no order can be enforced; and therefore, it is not a want of jurisdiction, but a want of the power of enforcing the jurisdiction. If an adult Englishman, who had entered into a contract to purchase an estate, were to go abroad and live there, leaving no property here, nobody could doubt that the court would have a jurisdiction against him to enforce specific performance. In one sense, it might be said that the court would have no jurisdiction,—not that it would have no jurisdiction, but it would have no control over the party, because it would have no means of reaching him; and just the same may be said as to an infant, if the parents and the infant are abroad, and the infant has no property, or the property is abroad. I could never say I had no jurisdiction over the infant, if it were a British-born subject, a subject of her Majesty; but I certainly might have no means of enforcing it. Therefore, I think that it is putting the matter upon a wrong footing to say that, because the child is out of the jurisdiction, therefore no jurisdiction exists over it. No power may exist, but the jurisdiction remains just the same as if the infant were in this country. That the jurisdiction does exist is plain; not only upon the principle that no one can withdraw himself from a jurisdiction which properly belongs to any subject; but it is also proved by authority, for in *Logan v. Fairlee*, 1 Jac. 193, the case of a person in Scotland, and in *Stephens v. James*, the case of a father who withdrew his child to the United States, it was held that there was a perfect jurisdiction, because there was some property, and the court exercised the jurisdiction which it was enabled to do.

Now, my attention was directed to a subject very intimately connected with this—the converse of it—namely, the jurisdiction which is exercised over foreign children in this country, and it was said, because it had been established, undoubtedly, that such a jurisdiction does exist, these are authorities to show that the jurisdiction would not exist as to English children out of the country. The reason that the jurisdiction exists over foreign children in this country, is, that foreign children, just like adults, while they are in this country, are, to a certain extent, the subjects of the crown of England.

For many purposes they are. The courts have decided that for this purpose they are, and, I think, on very good grounds. It is very true that extreme cases may be put. Suppose a person, just short of twenty-one years of age, a foreigner, came here, it would seem a ridiculous thing to file a bill to have a guardian of such a person, who might be here, having landed from Calais at Dover, in the course of the morning, and who might return to Calais in the course of the next morning. I was only saying that, in laying down any rule, there may be an extreme case so close upon the borders, that it shows that the exercise of the jurisdiction may be inconvenient in many cases, and, if you please, absurd. But I do not think, in this particular case of the jurisdiction over infants, that a person just under the age of twenty-one years is at all a case which illustrates the difficulties of the point, more than many others which may be suggested; and more particularly when it is considered that it is a jurisdiction that you may exercise with justice if the interests of the infants require it; and if a case were presented to me of a foreigner just twenty-one years of age, who wanted to go back to his own country, and a bill were filed to ask me to order maintenance, if I had power, I should say: "I will not interfere. What does the foreign parent wish?" I should exercise my discretion just as I should over wards of this court, who are clearly English subjects under my control. If the circumstances of the case rendered it expedient that they should be allowed to go abroad, on taking proper security, I should, of course, let them go, as my predecessors have done. In the case put, I should not want any security of a foreigner who was nearly adult, and who had only come over here for a temporary purpose. If somebody were to file a bill, merely because he was an infant, to molest him, the holder of the great seal would say: "Let that person go with his child without giving any security." There does not appear to me to be any difficulty at all with respect to the questions put. If the circumstance of these children having been born abroad and being abroad does not prevent my having jurisdiction over the matter, the question is, whether I ought to exercise the jurisdiction. Now, there are certainly many cases in which I think it would be improper that I should exercise the jurisdiction, or attempt to do it; as if, for instance, the parents and children were all abroad, and there was no property here. As I have already observed, I would not say I had no jurisdiction, because I would not exercise it. I might make an order, but what is the use of doing so if parties are not within my control? They might disobey it; and I should probably pay no attention to any application made under such circumstances, because I should feel that I should be doing no good and only incurring a sort of scandal, which every court does incur if it attempts to make an order which it has no means of enforcing. But here, it is to be observed, these circumstances do not exist. The father is here within the jurisdiction; the mother has appeared—I consider her as having appeared; and she is, therefore, for that purpose, within the jurisdiction. It is true she is living at Paris. She is a party in a cause in this court; she is a

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person who has appeared, and whom an order will reach; and I am not to assume that she will not obey an order in a cause in which she has appeared, and I will not abstain from making an order upon her merely because she is not within the jurisdiction. That would be a very dangerous principle to recognize in this country, where the habit of travelling is so common, where a person may go out of the jurisdiction in the course of half a dozen hours almost from any part of the kingdom. To say that an order should not be made upon persons because they happen to be at Paris, from which place they may come in twelve hours, is absurd; therefore I shall make an order as if she were only temporarily residing in Paris. Of course, I shall take care to make no order which, by the laws of France, so far as those laws are brought before me in the present proceedings, and so far as I can understand them, she cannot lawfully obey. The laws of France are like the laws of any other country; where a tribunal has to deal with them, they must be treated as matter of fact, and not as law; and we only know what the French tribunals will do, not as knowing their laws, but only as a fact which we may inform ourselves of as well as we can.

Now, by the law of this country, the father is certainly entitled to have the custody of these two children, the youngest of them being admitted to be now above seven years of age. Whether any order I could make would have extended to the youngest child when the bill was filed, I will not stop to inquire now, because I do not consider myself fettered with the point as to the time when the bill was filed. It may be true that I had not jurisdiction when the motion was made, before the 7th of May, when the child was under seven years of age; and perhaps it would not have been a discreet exercise of authority to have interfered. But now they are all above the age of seven years; and it is perfectly clear that, that being so, by the law of this country the father is entitled to their custody, and that the pendency of the suit at the instance of the wife in the ecclesiastical court to obtain a divorce does not prejudice or interfere with that right. Whether it be a right state of the law or a wrong state of the law, those who have to report these proceedings to the tribunals in France may state that it is a matter that will admit of no controversy; and those who advise Mrs. Hope will not pretend that, by the law of this country, the father is not entitled to the custody of the children. However, it is quite proper that the courts in France should be informed, so far as it may be desirable to inform them, that this is a right that this court can control and qualify whenever circumstances render it expedient to do so. If, for instance, it shall turn out that a case is made showing that Mr. Hope is (as to which not a syllable has been uttered at present) an immoral or dissipated man, or a man with whom, if the children are placed, it is likely their interests will be sacrificed, this court has the undoubted power, and will exercise the power, of controlling and interfering with the common parental rights, the rights of the father, to an unlimited extent; for there are no bounds to the interference of this court with the rights of a father, whenever those rights clash with the interests of the

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children. Of course, it is a jurisdiction that the court is extremely reluctant to exercise. Generally speaking, nothing can be so important as that the most intimate connection should be kept up between parents and children; but there may be circumstances which may render that improper; and when those circumstances do arise, the court will interfere without the least hesitation. But I know of no such suggestion in the present case. Some allusions have been made to affidavits which cast imputations on the one side and the other, some by the father, some by the mother; but nothing has been brought before me upon that subject; and I am only to assume that unhappy differences have arisen, and a suit has been instituted in the ecclesiastical court, which does not seem to have been prosecuted very vigorously, and, except that it was instituted, there is nothing whatever to lead me to the conclusion that there is any imputation whatever either upon the father or the mother. That being so, the father has the undoubted right to the custody of the children. Then, what course am I to pursue? The children are in France. The course of proceeding in France has been a most rational course, conformable to what, one might say, jurisprudence ought always to aim at. According to the laws of that country, no divorce can take place; there may be a separation, which does not differ very much from a divorce *à mens et thoro* here; but even if they have no jurisdiction, they say that question must be decided in the country to which the parties belong. They say, by the laws of our country there must be some interim order, if the proceedings shall go on in England between the parties, directing what shall be done with the children in the mean time. That would be the case to which I have referred in a suit for *séparation de corps* in the French courts. Some order would have to be made as to the custody of the infants, it being part of the proceedings in such a suit; and directions would be given as to the ultimate custody of the children as well as to the separation. They say, although there is no jurisdiction in the French courts as to separation or divorce between foreigners, yet the necessity of the case requires that there should be a jurisdiction exercised as to the interim care of the children; it is a matter *urgent et conservatoire*; and they make an order, the substance of which I understand to be, that the children are to be left in the custody of the mother, which is very reasonable. The eldest is only eight years of age and the youngest was at the time of that order under seven, and the mother is living in France and the father abroad. They give liberty to the father to have access to his children, but direct that the mother is to have the custody; the first order was until the decision in the divorce suit, the court understanding that the divorce suit would settle the two questions, namely, the separation and the custody of the children. In that they had fallen into a mistake as to our laws; a mistake which I wish, for the honor of our laws, was not a mistake, because it does seem irrational that the questions should be separated. We know how it has arisen in this country; but it is a misfortune. But the second order was changed somewhat in its terms; it is not under the second order that she is to have the custody until the determina-

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tion of the divorce suit, but until the competent court in this country shall have determined who ought to have the custody of the children. Now, I do not enter into any elaborate investigation of the order; that is the substance of it; and the course I shall take, therefore, is this: I shall preface my order by a declaration (and I think this due to the courts of other countries) that, by the law of this country, Mr. Hope is entitled to have the children delivered up to him, notwithstanding the pending of the suit in the ecclesiastical court for divorce; then I will order Mr. and Mrs. Hope, or either of them, to take all such steps as may be necessary and proper, according to the laws of France, for causing the children to be delivered up to Mr. Hope. I shall also order Mr. Hope to allow Mrs. Hope to have access to the children at all reasonable times, with liberty for her to apply to the court in case such access is not afforded.

It was then arranged that the order should not be drawn up for a week, to give time to Mrs. Hope's counsel to consider whether they would go into the question upon the merits, namely, whether Mr. Hope was or was not a fit *custos* for the children.

Subsequently to the order being drawn up, Mr. Hope made application to the courts in France that his two sons might be delivered up to him; and on that occasion Mrs. Hope appeared, by her counsel, and resisted the application; and the court refused to make an order for the delivery up of the children to Mr. Hope, on the ground that an appeal had been presented against the order of the Lord Chancellor, and that the pending of the appeal stayed the execution of the order.

A motion was then made, on behalf of the plaintiffs, that Mrs. Hope might be ordered within a week to deliver up the children, or to concur with Mr. Hope in any application to the courts for that purpose.

*August 5.* The LORD CHANCELLOR. (LORD CRANWORTH.) What has been done is this: the father, in obedience to my order, has made application to the French tribunals for the delivery up of the children. It was Mrs. Hope's duty to have instructed counsel to have appeared for her and consented to their being delivered up; but instead of that, the wife appears, and argues against her husband. If this were not a case in which the party was abroad, I should have made an order for her committal.

In an ordinary case, it would appear idle to preface the order with a declaration that an appeal does not suspend the execution of the order, but I shall take that course in the present instance. The order will declare that, according to the laws of this country, an appeal does not suspend the execution of a decree unless the Lord Chancellor shall think fit so to order, and that on a motion made for that purpose I should refuse to suspend the order. The order will then proceed in the language of the previous order, that, notwithstanding the appeal, Mrs. Hope do, within a week, deliver up the children or concur with Mr. Hope in taking such steps as may be necessary for authorizing or causing them to be delivered.

*Ex parte Bateman; In re Barbary.**Ex parte BATEMAN; In re BARBARY.*

November 4, 1853, and March 10, 1854.

*Retaxation of Bills of Costs — Jurisdiction of Registrar to tax prior to October, 1852 — Authority of Commissioner to review Taxation of Registrar — Rule as to permitting Appeal to the House of Lords.*

Solicitors to the assignees of a bankrupt had their bills of costs taxed in March, 1851, by the registrar of the Birmingham District Court, *ex parte*, without notice to the assignees, but in the presence of the official assignee, who had since died. In April, 1853, the assignees and some of the creditors applied to the district court for a retaxation of the bills, which, save 100*l.*, had not been paid, and retaxation was refused by the commissioner; but upon appeal: —

*Held*, that such bills must be retaxed.

As to the jurisdiction of the registrar to tax, Knight Bruce, L. J., doubted whether he had such jurisdiction prior to the orders of October, 1852, made pursuant to the Consolidation Act, 1849; but he had no doubt that, whether the registrar had such jurisdiction or not, it was the duty of the commissioner to review the taxation as a matter of course, and without proof of objectionable items; and Turner, L. J., while he considered it to be clear that the commissioner had authority to review the taxation, held it to be his duty to exercise that authority in a case where the bills contained a series of items *prima facie* unreasonable and entirely unexplained.

As to the leave to appeal to the House of Lords under the 18th section of the Consolidation Act, 1849, and the 10th section of the 14 & 15 Vict. c. 83, the court will not give it unless it is of opinion that the point is one both of sufficient doubt and of sufficient importance.

THIS was a petition of appeal against an order of the District Court of Bankruptcy at Birmingham, refusing, with costs, an application by the assignees and several creditors of the bankrupt, for a retaxation of the bills of costs of the solicitors of the assignees. The bills of costs had been taxed in March, 1851, by the registrar of the district court on the application of the solicitors, and the costs were allowed at the sum of about 1,717*l.*, in respect of which the sum of 100*l.* only had been paid on account. In April, 1853, the petitioners applied to the commissioner for a retaxation of the bills, alleging that they contained various extravagant charges; that the taxation had been made *ex parte* without their knowledge; that no copy of the bills had ever been delivered to the petitioners, or any of them, and that none of them were aware of the charges contained therein until the year 1853, when Mr. Kirby, their then solicitor, inspected the bills upon the file of the bankruptcy court. The commissioner considered that Mr. Kirby, who had been first employed by the assignees about the end of the year 1850, must, on the evidence before him, be taken to have known of the taxation of the bills when it took place; and, on the 8th of August, 1853, the commissioner finally refused the application, with costs, relying, as he stated, on the cases of *Horlock v. Smith*, 2 Myl. & Cr. 495; and *Ex parte Woolston*, 3 Mont. D. & De Gex, 702.

*James and Morris.* The petitioners, who are the assignees of the bankrupt and creditors upon his estate, ground their appeal from the

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*Ex parte Bateman; In re Barbary.*

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refusal of the commissioner to retax the bills thus taxed by the registrar of the district court, first upon the fact that, in point of law, there has been no true taxation; and, secondly, if the court shall be of opinion that there has been a taxation, that it is the right of the petitioners to have a retaxation, there not having been a payment of the bills, such right being a matter of course. It is contended, then, on behalf of the appellants, that the taxation in 1851, by the district registrar, was, according to the law as it then stood, no taxation at all, because the power and authority of the registrar of a country district court to tax bills of costs was given only by the 52d of the orders of the 11th of October, 1852, which did not take effect until the month of January, 1853. Any taxation, therefore, made previously to that time by such a functionary must, to be valid, have been made according to the law and practice existing previously to the passing of the Consolidation Act, and as, under such preëxisting state of the law, a district registrar had no power to tax a bill of costs, what he professed to do in this case was and is a mere nullity. But admitting, for the sake of the argument, and for that purpose alone, that the district registrar had such authority, still, it is of common right, and a matter of course, that the commissioner should review the taxation when made, there not having been payment of the bills of costs. Although the official assignee, who has since died, was present at the taxation, it appears upon the evidence, that the clerk to whom he intrusted this particular matter of business, was absent, so that practically the taxation was made wholly *ex parte*. The learned counsel cited and commented on the cases of *Ex parte Moore*, 1 Dea. 578; *Ex parte Wilson*, 3 Mont. D. & De Gex, 57.

*Rolt* and *Selwyn*, for the respondents, the solicitors. By the law as it stood at the time when these bills of costs were taxed, the registrars of the several courts were required to attend upon the commissioners, and to take charge of all proceedings before such commissioners, all such registrars being under the control of the chief registrar. In such a state of the law, the taxation by the district registrar, the same having been acknowledged by the commissioner, must be taken and treated as that of the commissioner himself; and the more especially as the 27th section of the Consolidation Act, which was then in force, enabled the registrar to act for the commissioner whenever the latter, from any reasonable cause, should be absent from his district. As it is not pretended that here there has been any fraud or surprise, and as what we now assert was the state of the law at that time, we say that the appeal to the commissioner, to be valid at all, should have been presented within the twenty-one days limited by the Consolidation Act for such a purpose. As to the alleged fact that some of the items are unreasonable, Mr. Kirby was present to watch the proceedings of the solicitors, and after such a length of time, and with that attendance of Mr. Kirby for such a purpose, the court will not direct a retaxation on the mere ground of unreasonable charges.

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*Ex parte Bateman; In re Barbary.*

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[KNIGHT BRUCE, L. J. Does this case fall within the 14th section of the 6 Geo. 4, c. 16?]

That act was repealed by the 27th section of the Consolidation Act, 1849, and this taxation took place in 1851.

*James*, in reply. To show that a district registrar had no such jurisdiction as was assumed by the functionary of the Birmingham court, it is only necessary to refer to the statute 3 & 4 Will. 4, c. 47. By the 8th section of that act, power is given to the district registrars to tax costs in bankruptcy as between party and party, so that it was necessary to have an act of the legislature to give authority to tax in that particular case; making it clear beyond all doubt that, until the orders issued pursuant to the Consolidation Act came into operation, no district registrar had any authority to superintend the general taxation of costs.

KNIGHT BRUCE, L. J. It is unnecessary to say how this case would have stood if the bills had been paid, or if one possible effect of the petitioners' success upon the present occasion might be, that there should be a repayment by the solicitors of any sum that they have received. But the bills have not, in any sense of the phrase, been paid; a sum of 100*l.* has been received on account, which, it is plain and admitted, must, in every possible event, be due to the solicitors and be retained by them: that is not questioned. The rules, therefore, which apply to paid bills, do not apply here. Again, if there had been a loss of documents, a loss of evidence or of the means of affording information, by death or otherwise, that might have made a material difference. But the case has no such ingredient, for I cannot consider the death of the gentleman who was official assignee during the whole or part of the period which has been the subject of the discussion, a material circumstance in the case; nor has it, indeed, been suggested, on either side, that that is a material circumstance in the case. Here, therefore, there are unpaid bills, with the fullest opportunity, on the part of the solicitors, of perfecting their case, producing their evidence, and establishing their title to the just amount of what may be due; and no considerations, therefore, which belong to a case where possible injustice may be done to the solicitor by the proceeding, can have place here. It is said that there has been a taxation; and that, therefore, there ought not to be another. That taxation was by a registrar of one of the district courts of bankruptcy, and the taxation took place after the Bankrupt Law Consolidation Act of 1849 had come into force, but before the orders of October, 1852; and one question is, whether, in that state of things, a registrar of one of the district courts of bankruptcy had authority to tax? Perhaps he might have had authority to do it if the case had been suggested, and proved to have come within that section of the Consolidation Act to which the learned counsel, Mr. Rolt, drew our attention. The case has not been put upon that ground. The registrar appears to have done it in exercise of an ordinary jurisdiction, supposed to have belonged to him as a matter of course. Now, I con-

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fess I doubt very much whether the jurisdiction did belong to him in the circumstances in which he exercised or professed to exercise it. But, assuming that the jurisdiction did belong to him in those circumstances, I am still of opinion that, as the law then stood,—without at all meaning to say at present how the law will stand with regard to cases which may come under the operation of the rules or orders of October, 1852, as to which I am perfectly silent,—but as the law stood at the time, to which it is material to look here, I am of opinion, I say, that if the registrar had the jurisdiction, it was incumbent upon the commissioner to review the registrar's taxation as a matter of course, without having any objectionable item proved to him or brought under his attention. Taking that view of the law then in force, I am released from the duty of examining the items, or giving any opinion upon the items which have formed the subject of discussion. It is with great pleasure that I find myself exempt from the performance of that duty; especially as I might possibly, by entertaining a view on any of those items, be, in a manner, prejudicing the solicitors' case, which I wish to leave perfectly open to them. Thinking it very possible, and (if I am at liberty to entertain any hope upon the subject) hoping that they may be able to establish a just title to all that they have claimed, I am of opinion that, acting upon the law which existed at the time to which it is material to look here, it was a matter of right, as I have already said, to have the taxation reviewed; and, accordingly, our order must be of that description. I have already disposed of the observations that have been made with regard to time, so far as I think it is material to do so; but I may add that, whatever may be the true view of the evidence with regard to Mr. Kirby's employment, and the notice that he had, I am of opinion, that he did not stand in a situation in which delay can be attributed to him; especially delay from which damage of any kind has been shown to have arisen to the solicitors concerned. Our order, therefore, I think, should be, upon the undertaking of the petitioners to abide by any order respecting the costs, charges, and expenses of the taxation, and otherwise, that this court may make: Declare that these bills ought to be retaxed, and, with that declaration, refer the matter back to the district court of bankruptcy; reserving the costs of this application, and giving liberty to the parties to apply.

TURNER, L. J. I am of opinion, also, that the order must be in the form which my learned brother has suggested. Assuming the registrar to be the proper officer to tax these bills, there must, undoubtedly, be a right in the commissioner to review the taxation. Application was made to him for that purpose; he has refused to do so; and the question which we have to consider is, whether he was right or wrong in that refusal. I do not propose to give any opinion upon the question, whether the commissioner was or was not bound as a matter of course, and without any special circumstances, to review that taxation; but I am of opinion that, under the circumstances of this case, he was bound to make that review. The grounds, which are

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urged in support of the commissioner's judgment, are two: first, that these parties, who are now presenting the present petition, had full knowledge of all the circumstances of the case, and, therefore, ought not now to be allowed to enter upon the taxation; secondly, that there is no case of fraud or surprise in this case now before the court. Now, with reference to the case of knowledge of the parties, it rests upon the fact of the assignees having employed a gentleman, of the name of Kirby, for the purpose, as it is said, of watching the conduct of the solicitors, against whom the present petition is presented. Assuming it to be so, it is perfectly clear that Mr. Kirby did not attend the taxation of these bills of costs, and it is equally clear, I take it, that he could not have done so; and, although I am by no means prepared to say, and do not mean to intimate an opinion, that the consequence of that would be that the bill ought to be submitted again to taxation, I think that the fact of there being no other party before the registrar upon the taxation of the bill, is a consideration which renders it the duty of the commissioner, and also the duty of the court, more carefully to watch the proceedings which are had before the registrar upon the taxation of a bill; and I think it a sufficient answer to that objection to say, although Mr. Kirby may have been employed, Mr. Kirby was not there, in truth, to watch the proceedings.

Then, on the other side, there being no case of surprise, (I am prepared to go as far as any one may go on such a question,) it is not upon the ground that too much or too little may have been allowed, that this court will open the taxation of a bill of costs, or direct the retaxation of one that has been already taxed. But if you find a series of charges *prima facie*,—for I do not intend to intimate that any one of these charges may not be maintained in the result,—unreasonable, unexplained, and not attempted to be explained, whether rightly or wrongly; if you find such a series of charges as are to be found in the present case, that is, in my opinion, a matter requiring investigation, and quite falling within the rules by which the court would require investigation to be had. The learned commissioner, if I may venture to say so, seems to have put a little too much reliance upon the observations that fell from Lord Cottenham, in *Horlock v. Smith*, which were addressed to a paid bill of costs, and not to a bill like the present, remaining unpaid. I, therefore, concur in the opinion which my learned brother has expressed.

*March 10.* This case now came on upon application by the solicitors, for leave to appeal to the house of lords against the decision of their lordships, directing the retaxation of the bills of costs.

*Rolt and Selwyn*, in support of the motion. The object of the present application is, that the opinion of the highest appellant tribunal may be taken on the subject of this litigation, which involves a serious question of law, and the appellants have, therefore, prepared a special case for the approval of this court, and when approved by your lordships, to be settled by you. The motion is grounded as well

*Ex parte Bateman; In re Barbary.*

upon the act 14 & 15 Vict. c. 83, as upon the Bankrupt Law Consolidation Act. By the 10th section of the former statute it is enacted, "that all decisions of the court of appeal, including decisions in matters of bankruptcy, shall be subject to appeal to the House of Lords, in the cases and under the conditions in and under which the like decisions would have been subject to such appeal if this act had not been passed; but the appeal in matters of bankruptcy shall be only on matters of law or equity, or on the rejection or admission of evidence, and on a special case, to be approved and certified by one of the judges of the court of appeal hereby constituted, whose determination on the settlement of such cases shall be final and conclusive." And by the 18th section of the Bankrupt Law Consolidation Act, 1849, under which appeals from the Lord Chancellor to the House of Lords were made previously to the passing of the act constituting this court, such appeals were authorized to be made in any case in which the Lord Chancellor should deem any matter of law or equity brought before him by way of appeal to be of sufficient difficulty or importance to require the decision of the House of Lords. In the present case, it is submitted, there is matter both of law and equity. The question, whether the taxation by the registrar was, according to the law as it then stood, in point of fact the taxation of the commissioner himself, from whose decision an appeal would not lie after twenty-one days, is a question of law; and the question, whether a taxation which has been made in the presence of the official assignee, as representing the bankrupt's estate, shall be opened after so long an interval, is a question on matter of equity. Both questions are, we confidently submit, of sufficient difficulty and importance to justify an appeal to the House of Lords.

*James and Morris* were not called upon.

TURNER, L. J. The court, however unwilling, as a general rule, to refuse to parties leave to appeal against a judgment pronounced by itself, has still the duty to perform of giving effect to the provisions of the act of parliament, and to exercise the best discretion it can in applying them. Now, the Bankrupt Law Consolidation Act has provided, that in matters of bankruptcy, an appeal is to be carried to the House of Lords only in those cases which the court shall deem of sufficient difficulty and importance to require the decision of that tribunal. It is the duty, therefore, of the court to refuse to give liberty to appeal, not only where the matter under consideration is not, in our view, of sufficient difficulty, but also where it is not, in our opinion, of sufficient importance; and I confess, so far as I am concerned, I do not view this case as one of much difficulty, and certainly not as one of sufficient importance to justify the court in acceding to this application; the sole question being, whether certain bills of costs of solicitors which have been taxed shall, under particular circumstances, be allowed to be retaxed. This application must be refused.

*Ex parte Harding; In re Pickering.*

KNIGHT BRUCE, L. J. Of course, I am of the same opinion. Let the application be refused.

James. And your lordships give the respondents their costs?

KNIGHT BRUCE, L. J. Certainly.

*Ex parte HARDING; In re PICKERING. Ex parte THORNTHWAITHE; In re PICKERING.*

April 22, 1854.

*Proof—Award—Liquidated Sum—Act of Bankruptcy before Judgment signed.*

A creditor brought an action against his debtor for the balance alleged to be due upon an account between them. The debtor consented to a verdict for 100,000*l.*, subject to a reference, the arbitrator to have authority to order a verdict to be entered for either party, with the costs of the suit and of the arbitration. The arbitrator, after more than six years, made an award in favor of the creditor for 11,345*l.* After the date of the award, and before judgment was signed, the debtor committed an act of bankruptcy, and gave notice thereof to the creditor, who afterwards entered up judgment, and subsequently the debtor was adjudicated bankrupt. The creditor claimed to prove for the awarded sum and the costs, which the commissioner allowed; whereupon the creditors' assignee appealed:—

*Held*, that the creditor was entitled to prove for the debt awarded, interest and costs as a liquidated sum, on the ground that the award was more than a verdict rendering this sum provable as a debt, until it could be shown that the award could be set aside at law.

THIS case came before the court upon an appeal presented by Mr. Harding, the creditors' assignee, against the decision of Mr. Commissioner Holroyd, admitting and refusing to expunge a proof against the estate of the bankrupt, Mr. Pickering, a bookseller.

The facts appearing upon the petition, the affidavits and proceedings, were these:—

In October, 1845, John Joseph Thornthwaite commenced an action against William Pickering, bookseller, the present bankrupt, to recover 17,795*l.* 5*s.*, the balance of an account current from June, 1825 to August, 1845.

The action was in assumpsit, and the declaration contained the common counts for money lent, paid, had, and received, interest, and an account stated.

Pickering pleaded thereto the general issue, the statute of limitations, payment and set-off for money lent, paid, had, and received, interest, and an account stated.

An account current had been rendered previously to the commencement of the action, to which account the particulars delivered of the bankrupt's demand referred.

A bill of particulars of the set-off was delivered in the action as follows:—

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*Ex parte Harding ; In re Pickering.*

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"The particulars of set-off in this action consist of all such items of set-off as are allowed and specified on the credit side of the account referred to in the plaintiff's particulars, and which the defendant is entitled to plead as such."

On the 3d of February, 1847, the cause came on for trial, before Wilde, C. J., and a verdict was taken by consent for 100,000*l.*, subject to a reference to a gentleman at the bar. By the order of reference, which was on the proceedings, the arbitrator was empowered to direct that a verdict should be entered for the plaintiff or the defendant as he should think proper, and the costs of the suit, to be taxed, were to abide the result of the award, and the costs of the reference and the award, to be taxed, were to be in the discretion of the arbitrator, and neither of the parties was to bring or prosecute any writ of error or any action or suit at law or in equity against the arbitrator, or against each other, or concerning the matters referred by the order, and either of the parties was to be at liberty to make the order a rule of court.

The meetings before the arbitrator commenced in June, 1847, and went on at intervals up to May, 1850, when the arbitrator died, and in November, 1850, another arbitrator was nominated, who took up the reference, and after several subsequent meetings, and after the reference had been in prosecution for about six years, namely, on the 5th of May, 1853, an award was made in favor of the plaintiff for 11,345*l.*

On the 9th of May, 1853, four days after the award was made, Pickering committed an act of bankruptcy by filing a declaration of insolvency, of which the plaintiff had notice the same day. Pickering filed the declaration of insolvency under the advice of his attorney, not exclusively, as the attorney deposed, to defeat Mr. Thornthwaite's judgment, although it had that object, in addition to something else; it was made, however, with the knowledge of several of Pickering's creditors and the petitioning creditor.

On the 12th of May, 1853, judgment was signed and the costs taxed, and Pickering's attorney attended the taxation. No application was made to set aside the award.

On the 20th of July last, at a sitting for choice of assignees under the bankruptcy, a proof was admitted on the proceedings for 12,210*l.* 17*s.* 10*d.*, being 12,147*l.* for damages and costs, and 63*l.* 17*s.* 10*d.* for interest from the 12th of May to the 29th of June last, on which day the petition for adjudication was filed.

The debt of the petitioning creditor was anterior to the 9th of May. The adjudication of bankruptcy against Pickering was made on the 30th of June.

An application was made on the 21st of February to expunge this proof, and it was made upon the ground that the judgment upon which the proof was founded was not signed until after the plaintiff (Thornthwaite) had notice of the act of bankruptcy, which was proved in support of the adjudication of bankruptcy. Upon that occasion it was argued that the proof should be expunged, wholly or partially, because the assignees had a set-off; and from the affidavits

*Ex parte Harding; In re Pickering.*

made by the bankrupt and by Mr. Smith, his attorney, and which appeared upon the proceedings, the claim to set-off arose by reason that evidence was tendered before the arbitrator to establish some items of alleged set-off, but which the arbitrator refused to admit, because the items were not included in the particulars of the defendant's set-off. It was also said that there were other items of a like kind, in respect of which no evidence was offered before the arbitrator, in consequence of the opinion expressed by the arbitrator in reference to the items which he had refused to admit.

The receipts and vouchers which were not brought before the arbitrator, and which it was said would establish a set-off, related to matters arising principally between the years 1825 and 1833, and the latest extending up to June, 1842. These items, although not in the particulars of set-off, were embraced by the plea of set-off. The attorney said in his affidavit, "that until after the order of reference had been made, I was unable to procure from the said William Pickering the various checks and vouchers relating to the account between him and the said John Joseph Thornthwaite between the years 1825 and 1833, and which said checks and vouchers were, as I believe, put aside by Pickering, as useless and immaterial, and had been lost; and I further say, that in consequence of his inability to find such checks and vouchers, I was unable to insert the amounts to which the same referred in the said particulars of set-off. And in support of the same point the affidavit of the bankrupt contained the following passage:—

"And I further say that all my checks and vouchers of a date previous to the year 1833, had been put away by me as immaterial and useless long previous to the year 1845, and that such checks and vouchers were not found by me for more than twelve months after the time at which the said John Joseph Thornthwaite brought his action for the recovery of the alleged claim, and not until after the order of reference thereof to arbitration had been made; and I was, therefore precluded from setting out such particulars of set-off as I might otherwise have supplied."

The commissioner upon these materials having refused to expunge the proof or to allow the set-off,—

Mr. Harding, the creditors' assignee, appealed on the former point.<sup>1</sup>

<sup>1</sup> The chief passages of the judgment of the commissioner pronounced on the 21st of February, were as follows: The application on the part of the assignees to expunge this proof was made upon the ground that the judgment upon which the proof was founded was not signed until after the plaintiff (Thornthwaite) had notice of the act of bankruptcy, which was proved in support of the adjudication of bankruptcy. The question then is, whether in an action of assumpsit for an antecedent debt when there is a verdict, subject to a reference under an order of *Nisi Prius*, and an award made thereupon before the bankruptcy, but judgment not signed until after the plaintiff had notice of the act of bankruptcy, upon which the adjudication of bankruptcy proceeded, a proof made upon the judgment so signed for the amount of the debt and costs, and interest from the time of signing of the judgment to the date of the adjudication can be supported? Mr. Linklater contended that the proof should have been made for

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*Ex parte Harding; In re Pickering.*

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*Swanston* and *Willes*, for the appellant, 'contended that as the judgment upon which the proof was founded was not signed until Mr. Thornthwaite had received notice of the filing of the declaration of insolvency by the bankrupt, that being the act of bankruptcy on which the adjudication was founded, the proof ought to be expunged. The judgment when signed did not relate back to the time before the notice of the act of bankruptcy, and therefore the judgment obtained here, and signed when it was by Mr. Thornthwaite, was not a fit subject of proof, and ought not to have been admitted. They cited and commented on—*Ex parte Bryant*, 1 Ves. & B. 211; *Ex parte Butterfill*, 1 Rose, 192; *Ex parte Kemshead*, Ibid. 149; *Ex parte Moody*, 2 Ibid. 413; *Ex parte Mudie*, 3 M. D. & De Gex, 66; *Cottam v. Partridge*, 2 M. & Gr. 843; *Smith's Mercantile Law*, 4th edit. 573.

*Rolt*, *Hoggins*, and *Hardy*, for the respondents, were not called upon.

KNIGHT BRUCE, L. J. Mr. Thornthwaite, claiming to be a creditor of Mr. Pickering, brought an action against him in 1845; the action was defended, and was brought to trial early in 1847, and was referred to arbitration, and the arbitration was pending until early in the year 1853. Mr. Pickering, having found that the award was made against him, resorted to the expedient of filing a declaration of insolvency, no doubt with the object of preventing his creditor, delayed as he had been from 1845 to 1853, from obtaining the fruit of the award. The present proceeding is on the part, not of Mr. Pickering, it is true, but

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the debt, as it existed at the time of notice of the act of bankruptcy being given; at that time the award was made, but the judgment was not signed, and as a judgment now does not relate back, he wished it to be inferred from the cases of *Robinson v. Vale*, 2 B. & C. 762; *Ex parte Birch*, 4 Ib. 880; and *Greenway v. Fisher*, 7 Ib. 436; that the judgment in this case was not properly the subject-matter of a proof. He further contended, that the court was not bound by the verdict, and that judgment after the notice of the act of bankruptcy was just nothing at all, citing *Ex parte Butterfill*, 1 Rose, 192. Here, however, we have the award as well as the verdict before notice of the act of bankruptcy, but if the award had not been made until after notice of the act of bankruptcy according to the case of *Ex parte Helm*, Mont. & M'Ar. 70; referred to by Mr. Hoggins, it would have made no difference as to the right of proof. The right of proof in cases like the present, is stated by the Vice-Chancellor in *Ex parte Poucher*, 1 Glyn & J. 385; followed in the above-mentioned case of *Ex parte Helm*, and in the subsequent cases of *Ex parte Ferris*, 2 M. D. & De Gex, 746; and *Ex parte Cocks*, 1 De Gex, 446. His Honor says: "It seems to me upon authority as well as upon principle, that where in an action founded upon contract, there is a verdict before bankruptcy and judgment afterwards, there the costs *de incremento* are provable, having, in effect, been incorporated with the existing debt by the verdict, though not ascertained in amount till the judgment. It appears to me, then, that the plaintiff in signing judgment was only taking the steps necessary to complete a right which was vested in him by the verdict and the award before he had notice of any act of bankruptcy; and, under such circumstances, I think notice of the act of bankruptcy can have no effect against the plaintiff's right of proof upon the judgment. I think, also, that as interest is made by statute accessorial to a judgment debt, the interest as well as the costs became incorporated with the existing debt under the verdict and award, and formed one entire demand; for these reasons, I am of opinion that the proof is right as it stands upon the proceedings."

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*Ex parte Harding; In re Pickering.*

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on the part of one of his assignees; but whoever be the petitioner, we must deal with the matter according to its merits. The award was made before any act of bankruptcy was committed, and the act of bankruptcy was resorted to by reason and in consequence of the award. An award has been compared to a verdict, and it has been said, that a verdict not followed by a judgment is nothing; and that the act of bankruptcy was before the judgment, and also that notice of the act of bankruptcy was given to the plaintiff in the action. This comparison to a verdict is to some extent correct, but it does not hold throughout. An award is not only tantamount to a verdict, but it is something more, for a verdict may be set aside on grounds upon which an award could not. If this award could be questioned at all, it could only be questioned on grounds on which it might have been discharged by a court of law. I have not at present heard any reason upon which the award could have been effectually disputed in a court of law. If, however, counsel should desire to add to the argument in this respect, I for one shall not be disposed to decline to listen to it. Subject to that, the award must stand; it is good and valid to show a debt, although there was no judgment, before the act of bankruptcy; and this declaration that the award must stand must be accompanied by a right to the costs of the award.

TURNER, L. J. This case is not open, in my opinion, to any fair question at all. The verdict was to be for the amount which the arbitrator should award. The whole matter was left to the arbitrator previous to the act of bankruptcy, but the judgment was not entered up until afterwards. The argument is, that this is no more than a verdict, and *Ex parte Butterfill* is referred to in support of that view. But that argument passes by this fact, that there was a perfectly good agreement for valuable consideration between the parties, that the amount decided on by the arbitrator should be the amount recovered by the verdict. It is argued that the arbitrator was in the place of a jury; if he was so, he was in the place of a jury whose decision both parties had agreed should be conclusive on them. If the petitioner could show that the award could be impeached at law, proceedings might have been taken in the courts of law to set it aside. In the absence of this proof, the debt must stand. The petition must be dismissed, with costs, and, considering the circumstances, we shall make no order as to how the costs are to be borne.

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*Ex parte Harvey; In re Blakely.*

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*Ex parte HARVEY; In re BLAKELY. Ex parte SPRINGFIELD; In re THE SAME.*

January 27, 30, and 31, and February 10 and 28, 1854.

*Principal and Surety — Release — Arrangement between Principal and Creditor — Concurrence of Surety.*

A principal debtor joined with a surety in a joint and several promissory note to a creditor of the principal debtor, for securing the debt. The principal afterwards executed an assignment of property for the benefit of his creditors, containing a release by the creditors, but no reservation was contained of the creditor's rights against the surety. The creditor to whom the promissory note was given, executed the deed with the privity of the surety, and on the understanding, as shown upon the evidence, that his rights against the surety were not to be prejudiced thereby. The creditor to whom the note was given and two other creditors were the trustees of the deed, and those three persons were the only creditors of the principal who executed the deed. The principal debtor was adjudicated bankrupt, the act of bankruptcy being the execution of the deed. The surety had before committed an act of bankruptcy, and had been adjudged bankrupt. The commissioner refused to permit the holder of the note and trustee of the deed to prove against the estate of the surety; but upon appeal:—

*Held*, that he was so entitled, and the commissioner's decision was reversed.

THIS case came on upon two appeals from the decision of Mr. Commissioner Fane on questions of proof. Although both the case of Messrs. Harvey and Hudson, and that of Messrs. Springfield and Co., arose under a transaction which took place in 1853, it is necessary to state facts relating to the former as far back as 1850. In the last-named year, Mr. E. T. Blakely, the son of Mr. Edward Blakely, the bankrupt, opened an account with Messrs. Harvey and Hudson, bankers, at Norwich, and the account having been overdrawn, they declined to give further credit, unless Mr. Edward Blakely would give a guarantee, which, on the 28th of November in that year, he did, to secure the repayment of any balance of account due to them by Mr. E. T. Blakely, not exceeding 2,500*l*. The transactions under this arrangement went on down to 1852, when the bankers were the holders of the bills of exchange for 300*l*. and 250*l*., drawn by Mr. E. T. Blakely, on, and accepted by, Mr. Edward Blakely, the bankrupt, and which they had discounted for their customers. In December, 1852, Mr. E. T. Blakely having overdrawn his account beyond the 2,500*l*., and being debtor to the bankers on these two bills of exchange, it was arranged that the guarantee of Mr. Edward Blakely, the bankrupt, should be given up to him, and that he and Mr. E. T. Blakely should give them a joint and several promissory note for the whole balance due, 3,030*l*. Such was the foundation of the claim of Messrs. Harvey and Hudson against the estate of the bankrupt, Mr. Edward Blakely.

The case of Messrs. Springfield and Co. was founded on the balance of and account for goods supplied to Mr. E. T. Blakely, in payment of which he had indorsed over to them certain bills of exchange, accepted by himself and indorsed by Mr. Edward Blakely, the bankrupt, as his surety.

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*Ex parte Harvey; In re Blakely.*

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In the above state of circumstances, Mr. E. T. Blakely made an assignment for the benefit of his creditors, and by an indenture, dated the 29th of March, 1853, made between Mr. E. T. Blakely of the first part, Mr. Springfield, Mr. R. J. H. Harvey (one of the bankers) and Mr. Starkie, described as "trustees for themselves and the rest of the creditors of the said E. T. Blakely," of the second part, and the several others persons, whose names and seals were thereunto subscribed and set, being respectively "creditors of the said E. T. Blakely, of the third part;" after several recitals, E. T. Blakely assigned all his personal estate to the trustees upon trust to collect and get in the same, and thereout, after paying the expenses, "to pay, retain, and satisfy, ratably and proportionately, and without any preference or priority to themselves, the said trustees and their partners, and the other persons parties hereto of the third part, the said several sums set opposite to their respective names in the said schedule hereto, subject to the covenant hereinafter contained for verifying the amounts thereof, and to pay the residue (if any) of the said moneys unto the said E. T. Blakely, his executors, administrators or assigns." This deed contained the following release: "The said several creditors, parties hereto of the second and third parts, subject to the proviso next hereinafter contained, do, and each of them doth, hereby acquit, release, and discharge the said E. T. Blakely of and from all and all manner of debt and debts, claims, and other demands, which they, the said releasing parties or any or either of them, their or any or either of their partner or partners, now have, or hereafter may have, against the said E. T. Blakely, his executors or administrators, for or in respect of any debt, transaction, matter, or thing up to the day of the date hereof:" subject, nevertheless, to a proviso therein contained for making the release void if E. T. Blakely had secreted property (other than linen and wearing apparel) to the value of 20*l.* or upwards.

Mr. Harvey, one of the trustees, executed this deed on the 7th of April, 1853, and it was also executed by Mr. Springfield and Mr. Starkie, but at what time there was no evidence to show. The schedule to the deed was prepared in columns for the names of creditors, amount of debts, seals, and other particulars; but not one of the blanks, whether relating to the trustees, or the other creditors, was ever filled up.

Mr. Edward Blakely was adjudged bankrupt on the 9th of April, 1853, the act of bankruptcy having been committed on the 6th of that month.

On the 28th of the same month of April, Mr. E. T. Blakely was adjudicated bankrupt, the act of bankruptcy being the execution of the before-mentioned deed.

The only questions now before the court were under the bankruptcy of Mr. Edward Blakely, in which Messrs. Harvey and Hudson tendered a proof for the sum of 2,857*l.* 7*s.* 6*d.*, the ultimate balance due to them on the promissory note for 3,030*l.*; and Messrs. Springfield and Co. also tendered a proof for their demand on the before-mentioned bills of exchange. The proof was rejected by the commissioner, on the ground

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that the reservation of the remedy against the surety, (the bankrupt,) ought to have appeared on the face of the release. The points were argued before Mr. Commissioner Fane, when the original liability of Mr. Edward Blakely was not disputed; but the assignees of his estate contended successfully that, by reason of the release contained in the assignment of the 29th of March, 1853, he was, and therefore his estate was, released from all liability.<sup>1</sup>

Affidavits were filed in support of each petition of appeal, and by the bankrupt, Mr. Edward Blakely, in opposition; the result of which may be shortly stated, although the evidence was of great bulk. The chief point in dispute, and the only material point to be here stated, was as to the time and the circumstances under which the deed of assignment had been executed by Mr. Harvey, and Mr. Springfield. The evidence in support of Messrs. Harvey and Hudson's claim to prove was, that Mr. Edward Blakely was well aware of, and privy to, the execution of that deed by Mr. Harvey, who executed it only in his character of trustee, and that he executed it at the bankrupt's instance; that he, (Mr. Harvey,) and his partner, had declined to have

<sup>1</sup> The judgment of Mr. Commissioner Fane, delivered on the 8th of June, 1853, was as follows: "This was an application by Messrs. Harvey and Co., bankers, of Norwich, to prove for 3,030*l.* against the estate of the bankrupt, Edward Blakely, on a joint and several promissory note of the bankrupt and his son, Edward Theobald Blakely, which had been given by him to the bankers to secure a debt of 3,030*l.* due to them from the son. The objection was, that the bankers had, through one of their partners, executed a deed of trust, whereby, in consideration of the assignment of all the property of the son in trust for his creditors, the creditors who executed the deed released the son from all demands, and it was insisted that the release of the son, the principal debtor, was a release of the father, the surety. The correctness of this proposition was not disputed; but it was said for the bankers that it was thoroughly understood, between the father, the son, and the bankers, that the release of the son should not operate as a release of the father, but that the bankers should still be at liberty to sue the father for whatever they did not get through the son. But to this mode of putting the case there are two answers, first, that a release of the principal debtor of itself raises so strong an implication of an intention to release the surety, that it is scarcely possible to rebut it; for were it not so, it would be a mere shifting of the burden, and not a release; and, secondly, if such really were the intention, it should have appeared on the face of the deed of release, otherwise the effect of the deed would be varied by parol evidence. This point was stated so long ago as 1819, in *Ex parte Glendinning*, Buck's Rep. 517, 520. Lord Eldon there said: 'Ever since Mr. Richard Burke's case, the law has been clearly settled, and it is now perfectly understood that, unless the creditor reserves his remedies, he discharges the surety by compounding with the principal; and the reservation must be upon the face of the instrument by which the parties make the compromise, for evidence cannot be admitted to explain or vary the effect of the instrument.' Lord Eldon there gave rather the technical and legal reason for the rule, than the real one, which is founded on the great principles of justice. Under an arrangement, each creditor is at liberty to dictate his own terms — one asking more, another less; and every other creditor may acquiesce in, or reject them; but whatever each creditor does insist upon, that he must proclaim on the face of the deed. It is not pretended in this case that Messrs. Harvey reserved their right of suing the surety, Edward Blakely, on the face of the deed, and therefore they could not sue him if he were not bankrupt, nor can they prove against his estate now that he is." In the argument before the commissioner, the following authorities were cited: *Newnham v. Stevenson*, 10 Com. B. Rep. 713; s. c. 3 Eng. Rep. 512; *Crofts v. Beale*, 11 Com. Rep. B. 172; s. c. 5 Eng. Rep. 408; *Lewis v. Jones*, 4 B. & C. 506; and *Byles on Bills*, p. 184.

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*Ex parte Harvey; In re Blakely.*

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any thing to do with the arrangement unless upon the clear and express understanding that Mr. Edward Blakely, the bankrupt, was not to be discharged from liability; that on the 7th of April, 1853, the bankrupt signed and delivered to them, Messrs. Harvey and Hudson, a memorandum in writing of that date, in the words and figures following: "Dear Sirs: I request you will take 10s. in the pound upon my son's estate. As to the residue, I hope to be able to satisfy you myself. Yours, &c., Edward Blakely." In answer to this, Mr. Edward Blakely in his evidence, swore that he never gave his assent to the deed, and knew nothing of its existence until some time after its execution by such persons as did execute it; and that it was untrue, as alleged, that there was any understanding on his part that he, Mr. Edward Blakely, was not to be discharged from liability, for no such understanding was ever entertained by him; that he signed the memorandum of the 7th of April, 1853, under the idea and belief that it referred to a wholly different arrangement from that contemplated by Messrs. Harvey and Hudson, an arrangement which had been proposed for settling the affairs of Mr. E. T. Blakely, and without the slightest reference whatever to the deed of the 29th of March, 1853. Evidence was given to show, and it was not contradicted, that Mr. Springfield was engaged in, as well as cognizant of, the preparation of the deed. Mr. Springfield also gave evidence, which, so far as it related to the petition of Messrs. Harvey and Hudson, was to the following effect: that Mr. Edward Blakely (the bankrupt) was cognizant of, and privy to, the whole transaction of the preparation of the deed, and expressed his great anxiety that the affairs of his son, Mr. E. T. Blakely, should be so wound up as to render the resort to a bankruptcy unnecessary; that Mr. Edward Blakely had actually requested him, (Mr. Springfield,) to take such steps as would secure the concurrence of Messrs. Harvey and Hudson in the arrangement proposed to be effected by the deed, and had given to him, (Mr. Springfield,) as a reason why those gentlemen should concur, that by so doing their rights and remedies against himself would not be prejudiced; and that Mr. Edward Blakely had upon all occasions, down to an extremely recent period, referred to and spoken of the deed as one which would not affect his own personal liability. This was the substance of the evidence on the petition *Ex parte Harvey*, from which that in *Ex parte Springfield* differed very little; and as the two petitions came on together, the decision of the latter depending on that in the former, any further analysis of the evidence is rendered unnecessary.

*Swanston, Rolt, Bazalgette, and Prentice*, for the petitioners in the first petition. As Mr. Harvey, according to his evidence, executed the deed only as a trustee, he did not in any way release the debt, and the more especially is this shown from the fact that the schedule is a blank, no debt being specified as due to him. It is true that the deed purports to release debts due to parties or their partners; but it is extremely doubtful, as appears from the case of *Smith v. Winter*, 4 Mee. & W. 454, and the judgment therein, whether a release of

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one partner is sufficient to release a debt due to the firm. Yet, admitting, for the sake of argument, that Mr. Harvey did execute this deed as a releasing party, such a release is sufficient to render the deed void, for it is an assignment of the estate of a debtor, and forms the foundation of an adjudication in bankruptcy. *Simpson v. Sikes*, 6 M. & S. 295. And the authorities are plain to show that a release being made which depends for its validity on the assignment, if that assignment be void, the release is gone. Bac. Abr. tit. "Covenant" (G); Com. Dig. tit. "Covenant" (F). And, although there is an interval between the deed and the adjudication, the validity relates back, as appears from the case of *Garlande v. Carlisle*, 4 Mo. & Sc. 24. We are not in any way affected with any considerations how far any assent of E. T. Blakely affects the case, for they can only be raised in discussing the validity of the bankruptcy against him, which is not now before the court. Mr. Edward Blakely is not released at law, whether the court considers him as a principal debtor, or as a surety for his son; because, Mr. Harvey, if he ever executed the deed as a releasing party, executed such an instrument as became absolutely void upon the bankruptcy of E. T. Blakely, the assignor. Even if it be admitted that Mr. Harvey did execute as a releasing party, and that such release was a valid act, still, Mr. Edward Blakely was not released; first, because he was a principal debtor and a surety, and secondly, because, if he was a surety, he assented to the deed. Upon the first point, the bankrupt was principal debtor on the bills which the bankers held, and which they gave up upon his joining in the promissory note on which proof is now sought, and whether these bills were or were not accommodation bills, matters not, for the bankers held them for value and without notice, and the principal object of the promissory note being given was to make both the bankrupt and his son principal debtors for the whole amount, and had that effect. *Williams v. Leper*, 3 Burr. 1886; *Castling v. Aubert*, 2 East, 325; *Brooks v. Haigh*, 10 Ad. & E. 323, and *Chitty on Contracts*, p. 512. It is clear from *King v. Hoare*, 13 Mee. & W. 494, that the release of one of two principal debtors, jointly and severally liable, is no release of the other. Then, upon the second point: the letter of the 7th of April shows that the bankrupt assented to the deed, so that even if he were a surety only he would not be released, nor, indeed, is it necessary for a surety to enter into any express agreement. *Samuell v. Howarth*, 3 Mer. 272, and *Clark v. Devlin*, 3 Bos. & P. 363. The reasons given by the learned commissioner, as to the reservation appearing on the face of the deed, are inapplicable, because it is proved that Mr. Edward Blakely was a party to the arrangement, supposing him to be a surety. *Mayhew v. Crickett*, 2 Swanst. 185; *Tyson v. Cox*, Turn. & R. 395; *Wyke v. Rogers*, 1 De Gex, M. & G. 408; s. c. 12 Eng. Rep. 162.

*Daniel and Aspland*, for the respondents in the first petition, the assignees of Mr. Edward Blakely. The interval between the execution of the deed and the time of the adjudication is important

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to be considered, because, during that interval, the trustees carried on the business of Mr. E. T. Blakely with the concurrence of the petitioning creditor, who thereby lost his right to treat that deed as an act of bankruptcy. It is erroneous to say that the validity of the bankruptcy of E. T. Blakely cannot be questioned upon the present occasion, for although we have proved under his bankruptcy, that cannot act as an estoppel of our right, inasmuch as that proof was the only means whereby we could place ourselves in a position of discovering whether this adjudication was valid or not. Assuming the adjudication to be valid, the deed of assignment was not void, but only voidable, as was decided in *Newnham v. Stevenson*, 10 Com. B. Rep. 713; s. c. 3 Eng. Rep. 512; and the right of Messrs. Harvey and Hudson against the principal debtor was abrogated by the deed, so as in point of fact not to have any existence in the interval between the execution of it and the adjudication. That being so, it follows as of course that the liability of Mr. Edward Blakely, the bankrupt, as surety, which he was, was gone and nothing, excepting only some act or deed to which he was a party, could revive it. *Bellingham v. Freer*, 1 Mo. P. C. Cas. 339. If the court were to hold that Mr. Harvey executed the deed only as a trustee, and not as a releasing party, still, it is submitted that the creditors, who, though they did not execute, still assented to, the deed, have a title to insist, in a court of equity, that Mr. Harvey is bound by it as a creditor; and the amount of debt not being stated in the schedule can make no difference, as the words in the releasing part of the deed are large enough to include all debts whatever, whether specified in the schedule or not. The assignees insist that Mr. Edward Blakely, the bankrupt, is not a principal debtor; but admitting, for the purpose of the argument, and no further, that he was, then they say that he was released from liability under the circumstances proved in this case. *Clayton v. Kynaston*, 2 Salk. 574; *Nicholson v. Revill*, 4 Ad. & E. 675; *Bailey v. Haines*, 15 Q. B. Rep. 533; and it was decided in *Ford v. Beech*, 11 Ibid. 852, that a right of action once suspended is gone forever. Upon these authorities, therefore, the assignees contend confidently, that the right of action was suspended from the time of the execution of the deed of assignment and the date of the adjudication, and that the remedy on the promissory note is gone; for which reason they add, that no resort can be had to the original consideration, and that not only on this ground, but because the surrender of the original bills and the giving up of the guarantee formed the consideration for the promissory note. The deed of assignment does not, as the commissioner justly remarked, reserve any remedies against sureties, and such omission renders the deed void as against other creditors. *Cockshott v. Bennett*, 2 Term Rep. 763; *Ex parte Glendinning*, Buck, 517, and *Wyke v. Rogers*, 1 De Gex, M. & G. 408; s. c. 12 Eng. Rep. 162; and such a view is materially supported by the Lord Chancellor's observations in the last-mentioned case. Evidence is not admissible to show that a party who has executed a deed in a particular character did not intend to do so. *Cocks v. Nash*, 9 Bing. 341. And therefore it cannot now be said that Mr.

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Harvey did not execute the deed as a releasing party. *Tuck v. Tooke*, 9 B. & C. 437, and *Espey v. Lake*, 10 Hare, 260; s. c. 15 Eng. Rep. 579, were also referred to.

*Swanston*, in reply. The execution of the deed by Mr. Harvey as a trustee, in which character alone he executed it, does not release the debt. *Bain v. Cooper*, 9 Mee. & W. 701. And that deed was never intended to have any operation upon the debt until all the creditors had come in and signed. *Thompson v. Lack*, 3 Com. B. Rep. 540, proves that where there is an intention shown on the face of the deed that the surety should remain bound, such surety is not released; and this is so, even if the language of the deed is consistent with the reservation of the remedy against the surety. Then, let us suppose Mr. Edward Blakely to be a principal debtor, and suppose the release to be valid, still, that is only a release of his separate liability, and leaves his joint liability untouched, he and his son being jointly and severally liable; and it has been held in *Dean v. Newhall*, 8 Term Rep. 168, that a covenant not to sue one of two principal debtors who are jointly bound, does not discharge the other.

*February 10.* The case was this day argued upon Mr. Springfield's petition, the principal point (in addition to those made in *Ex parte Harvey*) being, whether the assignment, if it had been executed by six sevenths of the creditors, would have been binding under the 224th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, and would not have released the sureties; and it was argued that it would be an absurdity to hold that the sureties were released merely because no creditor came in.

*Swanston and Palmer*, for the petitioner, Mr. Springfield.

*Daniel and Aspland*, for the respondents, the assignees of Edward Blakely, the bankrupt.

Their lordships reserved judgment.

*February 28.* KNIGHT BRUCE, L. J. The petitions in this case are like many others, which, although in form are appeals, are not so in substance, but come before this court supported and opposed by testimony which was not before the learned commissioner in bankruptcy. The evidence before us is of a very conflicting nature, and the affidavits, on one side or the other, manifestly contain more or less of incorrect swearing. It is our duty to weigh and consider that testimony, and, having done so, to terminate this litigation. First, then, as to the petition of the bankers. The object of that petition is to establish the title of Messrs. Harvey and Hudson, to prove for the amount of a joint promissory note signed by Mr. E. Blakely and his son, Mr. E. T. Blakely, and this claim is opposed by the assignees of Mr. E. Blakely on the ground of the execution by the petitioner,

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Mr. Harvey, of a deed of trust, dated the 29th of March, 1853, which they contended has discharged the son, and therefore, also, Mr. Blakely, the father. The learned commissioner has thought the assignees right, and has rejected the proof. The son has been made a bankrupt on the ground of the execution of the deed, and as no one has raised the point, and as the bankruptcy against him is in full force, I give no opinion, whether the petitioning creditor is entitled to treat the execution of the deed as an act of bankruptcy. The main point taken against the admitting of the proof has been, whether the father joined in the note as surety for the son; but this would be immaterial if the father, before committing an act of bankruptcy, had notice of and approved of, or assented to, the execution of the deed. The petitioners affirm, the respondents deny, this, and there is a conflict of evidence; and the question for us is, to say whether it ought or ought not, upon the evidence, to be believed that such was the case. The knowledge and assent of the father is a proposition probable in itself, and, upon a just estimate of the materials before the court, in my opinion, such knowledge and assent must be decided to be established. Such knowledge and assent, I repeat, are probable, and may justly be inferred from the undisputed facts of the case, and such notice and assent must be considered to have existed. The arrangement, of which this deed formed a part, was never completed, and such arrangement, ultimately, fell to the ground. The deed was not executed by Mr. Harvey until the 7th of April, and within a month from that time, the son was adjudged a bankrupt. The trustees were also creditors, although Harvey was only a creditor in the capacity of a member of the firm to which he belonged; he, however, executed the deed both as trustee and creditor. The deed was not executed by any creditor, except the trustees; it did not specify any debts, and no dividend ever was paid under it. The bankruptcy of the son was grounded, and must be taken to have been duly grounded, on the execution of it. Harvey must be taken not to have executed it with an intention to release the father. There is no reason to believe that Mr. Harvey executed it with a view to release Mr. Blakely, the elder, from the promissory note, or that any party to the deed when executing it, believed that it would have that effect. The deed might have been so framed as to make it manifest that the father could not claim to be released, and it is plain that Mr. Harvey would not have executed it unless altered in that way, if he had been informed that in its actual form it would operate as a release of the father. If the execution of the deed did not, at law, release the father, it cannot in equity; if it did so at law, yet it did not in equity, for a court of equity could, if necessary, reform the deed, and thus by reformation of the deed or otherwise, this court might relieve the petitioners against its legal effect, and restore them to their rights of action against the father. The result, therefore, is, that we must declare that Messrs. Harvey and Hudson have the same right of proof as if Mr. Harvey had never executed or known of the existence of the deed, and are entitled to their costs, except such as are caused by their employing the superfluous number of four counsel, and by a

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charge of abstracting property, which charge has not been sustained. The defence is not founded in justice: the equity of the case, not only in the judicial, but in every sense of the term, is with the petitioners, and the failure of the defence is most complete. Much the same sort of reasoning applies to the petition of Mr. Springfield, and a similar order must be made upon it. It is, in my opinion, immaterial whether the father was a principal debtor or only a surety. If the idea had occurred to Mr. Springfield that by executing the deed he should release the father, he would, no doubt, have refused to execute it; and that deed, which has produced no effect but the bankruptcy of the son, ought not, therefore, to be set up against the claim. I think it also immaterial to say, whether the 224th section of the Consolidation Act has any bearing on the question before us.

TURNER, L. J. The case cannot be put more strongly against the petitioners than by assuming that the father was only a surety, and that the trustees executed the deed as creditors as well as trustees, and I shall deal with the case on that footing. It is, then, to be considered whether the father concurred in the deed or assented to it before committing an act of bankruptcy. If he did, there is no serious difficulty in applying the law to the facts of the case. [His lordship then went through the evidence at length, and continued:] The conclusion of fact at which I have arrived upon the evidence is, that the father concurred in the execution of the deed by Mr. Harvey, on the footing that he himself was to remain liable, and that he ratified Mr. Springfield's execution of it on that understanding. Now, it is not disputed that a surety, who concurs in an arrangement between the principal and the creditor, is not discharged by such arrangement; but it has been said that the effect of this deed of release, containing no reservation of the remedies against sureties, was to discharge him. I am myself, however, disposed to think that it is in some cases necessary that the reservation should appear on the face of the deed, in others not; but, at all events, the omission of such express reservation is not enough to deprive the petitioners of their independent equity arising from the fact that they executed the deed at the request of the surety, who, therefore, cannot claim to be discharged. The case differs in its circumstances from *Lee v. Lockhart*, 3 Myl. & Cr. 302, but the remarks of the Lord Chancellor in that case bear strongly upon it. It is there said: "The decisions referred to proceed upon clear, intelligible principles; but they do not appear to me to have any application to the present case, in which the only question is, whether a person having a valid security for his debt, but induced by the debtor to execute an instrument legally affecting such security, under a representation that such would not be the effect, and a promise that it should not, is, upon the application of such debtor, to be held to be deprived of such original security. I am clearly of opinion that he cannot be considered as so deprived." I am, in the case now before us, therefore, of opinion that the proof must be admitted, and that the costs, with the exception adverted to by my learned brother, must be paid out of the bankrupt's estate.

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## WATLINGTON v. WALDRON.

December 14, 1853.

*Will, Construction of — Power to cut Timber — Trust.*

A testator, after devising specific real estate, devised all the residue of his estate to trustees for ninety-nine years, without impeachment of waste; and, subject thereto to his son W. for life, without impeachment of waste; remainder to his granddaughter C, for life, without impeachment of waste; remainder to her issue in strict settlement. The trusts of the term were to raise money by mortgage or sale of the premises comprised therein. The will contained a proviso that no part of the timber upon the residue of his real estate should be cut until his granddaughter attained twenty-one, at which time his trustees were to cut such timber as they should think fit, and pay the proceeds to his granddaughter for her sole use. In 1835, W. died, and in 1836, the granddaughter attained twenty-one, and died in 1842, leaving an only child and her husband surviving her, the trustees not having exercised the power of cutting timber. In 1843, the term was sold for the purposes of the trust: —

*Held*, that the purchaser was entitled to the timber standing upon the estate at the time of the sale.

JOHN WEBB, by his will, dated the 31st of July, 1826, devised all his real estates in Norcut to the use of his son W. B. Webb, for life, with divers remainders over: and he devised all other his real estates to Daniel Wiltshire, and Daniel Wiltshire the younger, their executors, administrators and assigns, for the term of ninety-nine years, without impeachment of or for any manner of waste, upon the trusts, thereafter declared; and subject to the said term, to the use of his son W. B. Webb, for life, without impeachment of waste; remainder to trustees to preserve; remainder to the use of his granddaughter, Caroline Sarah Webb, for her life; remainder to trustees to preserve; remainder to the use of her first and other sons in tail; remainder to the use of her daughters as tenants in common in tail, with cross remainders. And the testator declared the trusts of the said term of ninety-nine years to be, that, in case his personal estate should happen to be insufficient to pay and satisfy the several legacies given by his will and the sum of 4,000*l.* charged on his Norcut estates by his son W. B. Webb's marriage settlement, that D. Wiltshire and D. Wiltshire the younger, or the survivor, &c., should, by and out of the rents, issues, and profits of the estates comprised therein, or by demise, mortgage, or sale of the whole or part thereof, or by all and every or any of the ways and means aforesaid, levy and raise such sum of money as should be sufficient to answer, satisfy, and make up such deficiency; and that after answering the purposes aforesaid the term should cease. The will contained also the following proviso: "Provided also, and I do hereby declare, that it shall not be lawful for my said son W. B. Webb to cut any part of the timber standing, growing, and being upon my said farms, &c., in Norcut, for any purpose whatsoever, except for necessary repairs, &c. Provided also, and I do hereby direct, that no part of the timber standing, growing, or being in, upon, or about the residue of my said freehold lands, &c.,

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shall, upon any pretence or for any purpose, (except for necessary repairs,) be felled or cut until my said granddaughter Caroline S. Webb shall attain the age of twenty-one years; at which time it shall be lawful for my said trustees to mark, fell, cut down, cart, and carry away such timber as they shall think fit, and to sell and dispose of the same for such price or prices as they may think proper, and to pay the money to arise and be produced by such felling, sale, and disposition unto my said granddaughter Caroline S. Webb, for her own sole and separate use and benefit." The testator appointed his son W. B. Webb, and D. Wiltshire and D. Wiltshire the younger, executors of his will. The testator died in March, 1828, leaving W. B. Webb, his only son, him surviving; and his will was proved by D. Wiltshire the younger alone.

By a decree made on the 15th of June, 1832, in the cause of *Webb v. Grace*, the defendant, D. Wiltshire the elder, disclaiming all the trusts of the will, it was ordered that the will should be established and the trusts thereof carried into execution. W. B. Webb died in 1835, leaving Caroline S. Webb, his only child, him surviving, who attained her age of twenty-one years on the 4th of October, 1836. By a decree in the said suit, dated in March, 1841, after stating that the personal estate was exhausted, and that it was admitted that the term of ninety-nine years devised by the residuary clause of the testator's will would be required, a sale was ordered of the lands comprised in the term. Caroline S. Webb intermarried with the defendant H. Waldron, and died in November, 1842, leaving the defendant, Caroline Elizabeth Waldron, her only child, her surviving, and H. Waldron took out administration to his deceased wife. In January, 1843, in pursuance of the decree, the estates comprised in the term of ninety-nine years were put up for sale by auction, in several lots, and subject to certain conditions of sale; the sixth only of which conditions related to the present question, and was as follows: "The said J. Webb, the testator, by his will, directed that no part of the timber upon the hereditaments (except for necessary repairs) be felled or cut until his granddaughter Caroline S. Webb should attain twenty-one years, at which time it should be lawful for his trustees to fell such timber as they should think fit, and dispose of the same for such price or prices as they should think proper, and pay the money to arise therefrom unto his said granddaughter. The estates comprised in the accompanying particulars are put up for sale, subject to any rights under such provision."

W. Watlington, deceased, now represented by the plaintiff, J. H. Watlington, became the purchaser of the largest portion of the lots, and the purchase-moneys, amounting to 5,804*l.* 15*s.* 11*d.*, were paid into court; and by an indenture, dated the 8th of July, 1850, the estates were assigned to him for the residue of the ninety-nine years' term, subject to the sixth condition of sale. By an order made in the above-mentioned suit, a reference was directed to the master, to inquire and state to whom the timber upon the estates and premises comprised in such term belonged at the time of the sale. The master reported that the trustees, subsequently to the granddaughter coming

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of age, did not cut down any timber upon the estates so sold; and he found that the timber thereon belonged to the defendant, Caroline E. Waldron, as reversioner in fee under the will of the testator; thereupon, Caroline E. Waldron presented a petition, praying that she might be at liberty to enter the said lands and cut the timber thereon, and to sell the same, the produce of such sale to be paid into court and invested.

The petition came on to be heard before Lord Cranworth, V. C., in February, 1851, when his lordship dismissed it, with costs. The petitioner being about to appeal against this decision, it was arranged between the parties that the question, as to the right to the timber, should be brought before the court upon a special case under Sir G. Turner's Act, the 13 & 14 Vict. c. 35. The questions raised by the case were, first, whether the said J. H. Watlington has or has not the right to fell, cut, and carry away for his own use, and not for repairs merely, such of the timber now standing, growing, and being, or which may hereafter, during the said term of ninety-nine years be standing, growing, or being in and upon the estates and premises comprised in the said term, as he may think proper. Secondly, whether the said Caroline E. Waldron has or has not the right, under the circumstances hereinbefore stated, to fell, cut, and carry away the said timber for her own use. Thirdly, whether the said H. Waldron has or has not any right or claim to the said timber, or any part thereof.

*Russell and Morris*, for the plaintiff in the case, the representative of the purchaser. The term for years precedes all the limitations, and is without impeachment of waste. The proviso, therefore, in the limitations, will not affect the rights of the termor; but, if otherwise, then the trustees have not exercised the discretion given them; and the granddaughter having attained twenty-one, the restriction is at an end.

*Bacon and Lonsdale*, for H. Waldron. The power given to the trustees to cut timber amounts to a trust in favor of the granddaughter. *Hewett v. Hewett*, 2 Eden, 332; *Briggs v. Lord Oxford*, 5 De Gex & Sm. 156; s. c. 11 Eng. Rep. 265.

*Baily and Hoffman*, for the infant tenant in tail.

The LORD CHANCELLOR, (LORD CRANWORTH,) (without calling for a reply.) It appears to us that the case admits of no reasonable doubt. The testator, by his will, after giving the estate at Norcut to his son W. B. Webb, with remainder to his first and other sons, gives the residue of his estates to trustees for the term of ninety-nine years, without impeachment of waste, for the purposes thereafter mentioned; that is to say, if his personal estate should happen to be insufficient to pay and satisfy the several legacies thereinbefore bequeathed, and the sum of 4,000*l.* charged on the Norcut estate, that the trustees should, out of the rents, issues, and profits of the property, or by demise, mortgage, or sale of the whole or any part thereof, or

by all or every or any of the ways or means aforesaid, levy and raise such sum of money as should be sufficient to answer, satisfy, and make up such deficiency. Then, subject thereto, he gives it to his son for life, without impeachment of waste, with remainder to his granddaughter for life, without impeachment of waste, with remainder to her first and other sons and daughters in tail. The will was dated in July, 1826. At that time the granddaughter was in her eleventh year. The testator died about two years afterwards — early in the year 1828. Now, that was the state of the family; and in the will is contained these clauses. The first is: "And I do order and direct that no part of the timber standing, growing, or being in or upon or about the residue of my freehold lands," &c. [see the clause above.] The question is, whether this proviso, restraining the cutting of timber, was a proviso which so operated upon the term, that the trustees of that term, in selling it, with reference to a necessary discharge of their duty, did not make a title to the purchaser? That is the only question. Now, in the first place, one cannot but see that that was an extremely improbable intention for any testator to have had, who chose to make a provision to supply legacies and annuities by means of a term of years upon his estates; although a necessity for selling that estate, under the power which was contained in the will, might, for aught he could tell, arise the next day after his death. That being so, it is extremely improbable that the testator could have meant that the estate should be sold for ninety-nine years, and sold with that clog upon it, that when his granddaughter, eight or ten years afterwards, should attain her majority, then certain trustees might come upon the estate and cut down such timber as they thought fit for cutting, (for that is the interpretation put upon it,) in order to give the proceeds to his granddaughter. This is an exceedingly improbable intention, but that is what is and must be contended for by the defendants. I have already stated that, although in truth the sale did not take place until long after the granddaughter attained twenty-one — that was an accident; it might have taken place in due discharge of the trusts long prior to that time. Now, that construction being a very improbable one, the court will not assume, unless the testator has so worded his will, that that must be the interpretation of the language he used in it. One must look at the language with great suspicion; and it is very important, if possible, to find some other construction more consistent with the probable intention of the party who has used the words. Now, I think there is no difficulty at all in understanding this proviso as referring only to the interest of the person in enjoyment of this estate. The term that he created for the purpose of satisfying certain charges, if it became necessary to avail himself of that term, was an interest that he never contemplated as being affected by the proviso. Let us see whether there is any thing in the language which is inconsistent with that construction. As to the Norcut estate, in which his son alone was interested, he simply says, he shall not cut timber upon that estate at all, "except for necessary repairs." Then he says, "it is my will, and I do hereby order and direct," — now, I am assuming

that he does not mean to deal with the term at all, but only with the interest after the term, — “that no part of the timber standing, growing, or being in, upon, or about the residue of my said freehold lands, tenements, and hereditaments, shall, upon any pretence, or for any purpose whatsoever, (except for necessary repairs,) be felled or cut until my said granddaughter, Caroline Sarah Webb, shall attain the age of twenty-one years.” That is, he contemplated, very likely, that the estate would be sold; and how was it to be enjoyed? His son would be in the enjoyment of the estate, having, according to the terms of the will, an estate unimpeachable of waste. Then, after his death, his son’s daughter, the granddaughter of the testator, was to have it for her life. He knew better than we what were the wants of the family; and he might very likely think, “when the daughter attains twenty-one she may be scantily provided for; there is timber upon the estate, and although I have given it to my son without impeachment of waste, I will not let him exercise that power except for repairs; he shall not cut any of the timber upon that estate until my granddaughter attains twenty-one, and then I authorize my trustees to cut and sell such of the timber as they think fit.” I must own, I do not construe that as Mr. Bacon does, “as they think right or as they think fit;” that is not the meaning. He gives them an absolute discretion; he calls them, at the early part of his will, “his dear friends,” persons in whom he has confidence; he gives them a discretion to cut whatever they may think fit, in order to put, even in the lifetime of the father, a sum of money into the pocket of the daughter. That seems to me to be consistent. There is nothing in the will inconsistent with that interpretation of it, and that is a very rational motive. If the daughter, at the time she attained twenty-one, had outlived the father, as turned out to be the case, it was idle to create a power at all; she had an absolute power in the estate, without impeachment of waste, and she would be allowed to cut down any thing she might think fit. But the contingency he thought to provide against was, the contingency of her attaining twenty-one in the lifetime of her father, when — I suppose she had no other provision — he thought it might be an extremely useful way to make a provision for her, to empower the trustees to cut such timber as they might think fit, in order to raise a fund for the daughter. That is the interpretation fairly to be put upon this language, and which enables us to avoid the strange anomaly, that the testator could possibly have meant that the estate was to be sold, and sold under the extraordinary contingencies attached to it, that if the daughter should attain twenty-one, the vendors of the estate might come upon it, and cut down any quantity of timber they might think fit. It would be an extraordinary power, which one must know would entirely prevent the absolute sale of the estate at all. No one would have purchased under such conditions. I am clearly of opinion, therefore, that it is a reasonable construction to suppose that a purchaser who purchased this estate, which was an estate, in truth, freed from this proviso, took it absolutely for ninety-nine years, without impeachment of waste, and, consequently, that we are to answer the case in his favor,

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and not in favor of the vendor. If we had to decide between other persons, Mr. Baily will allow me to say, that I do not think he could make much of it, because, if there was any point, it would be that there was something personally intended for the daughter. If she chose to waive it, her waiver would operate for the benefit of the whole inheritance. She might say: "I will not have it cut; let it grow." It would be incumbering the ground as far as the purchaser is concerned; for the granddaughter might, when she attained twenty-one, come upon the estate, and cut it down for her benefit. I think that would be a very strange construction indeed. It seems to me that the construction is quite plain.

TURNER, L. J. This testator has given his estates to trustees for the term of ninety-nine years, without impeachment of waste, upon trust, to supply the deficiency of his personal estate for payment of his debts and to pay off a charge of 4,000*l.* upon another estate which he devised to his son. He has then given the estates to his son for life, without impeachment of waste, and then to his granddaughter for her life, without impeachment of waste; and he has inserted in his will this proviso.

[His lordship here read the proviso.]

Now, in the first place, the disposition of the estate to the trustees for the term of ninety-nine years, without impeachment of waste, most undoubtedly gives the trustees *prima facie* a right to cut the timber upon the estates for the purposes of the trusts which are vested in them; and if this proviso, which is inserted, "that no timber shall be cut until the daughter attains twenty-one, at which time the trustees, shall cut as much timber as they shall think fit, and shall pay the proceeds to the daughter," is to be read as an absolute gift in favor of the daughter, of the timber upon the estate, the two clauses in the will giving power to the trustees to cut, upon trust for the purpose of paying the debts, and, on the other hand, giving the proceeds of the timber to the daughter, would be utterly inconsistent. And I take it to be a perfectly good rule, and a general rule, that, in construing wills, you must endeavor to put upon them such a construction as will make the whole instrument consistent, and not make one part of it opposite to and conflicting with the other. Well, it is said, this may be all rendered consistent by supposing that the testator meant by the proviso to take entirely out of the clause, with reference to impeachment of waste, the timber upon the estate; that he considered, in short, that the clause, "without impeachment of waste," was not directed against timber, but against some other object, upon which waste might be committed. It is quite clear that this testator, at the time he framed this proviso, had in contemplation the timber upon the estate, and had the timber in contemplation as having fallen within the previous disposition of the will, reached by the clause "without impeachment of waste;" because he begins in that clause by saying: "Provided always, and I direct, that no part of the timber," showing, therefore, that he had considered that the previous devise of the estate, "without impeachment of waste," had enabled the timber

to be cut ; and he says, "it shall not be cut during the minority of the daughter." I think, therefore, that construction cannot fail. Then it must be seen by what other means the intention of this testator can be rendered consistent. It seems to me, the true meaning of this testator's will was this: "I give this estate to the use of my trustees, for the term of ninety-nine years, without impeachment of waste, upon trust for the payment of my debts ; but my granddaughter is tenant for life of this estate in remainder behind my son. Now, it may happen that my son may survive me, (and, of course, the testator must have thought the probability would be, that the son would survive him,) and if my son should survive me, there will be no provision for my granddaughter during the life of my son ; and therefore I will give power to my trustees to cut down timber upon the estate, in order to make a provision for my granddaughter, if, at the period at which my granddaughter attains twenty-one, that provision shall be required for her." That this was the meaning of the testator is pretty evident from this—he could not mean to give it absolutely to his granddaughter, at all events, under the trusts to cut ; because if the granddaughter was in possession of the estate at the death of the son, (she got into possession immediately upon his death,) she herself had, under the gift to her of the life estate without impeachment of waste, power to cut timber. Then, again, if you consider this will, there is a trust for payment of debts, and of the charge upon the Norcut estate ; and we are asked to suppose that the intention of this testator was totally and entirely to destroy the express trust which was contained in the will for the payment of debts, by creating a trust upon the timber for the benefit of the daughter when she attained twenty-one. I think, therefore, taking these two circumstances into consideration, it is perfectly clear that this must be construed as a mere power given to the trustees to raise money for the benefit of the daughter, if at the time the daughter attained twenty-one, it should become in their discretion necessary and proper so to do. Now, the case of *Hewett v. Hewett* has been cited, upon which it will be expedient to say a word. That case was different from the present. In that case, there were life estates created, impeachable of waste ; but the consequence of the creation of the life estates was, that no timber whatever could be cut upon the estates during the lifetime of the tenant for life ; and, therefore, if you find a power in that will to cut such timber as the trustees should think fit, you might very well construe that power to mean, that the trustees should exercise their discretion as to the timber which was to be cut. But the great distinction between the case of *Hewett v. Hewett* and this is, that in each of the limitations which are contained in this will, you find that the estates are given without impeachment of waste, and that constitutes the whole difference ; because there is in the limitation, "without impeachment of waste," a right given to persons who are in possession to cut timber, which renders the powers unnecessary for the trustees, as it was in the case of *Hewett v. Hewett*, when they shall be of opinion it should be cut. It seems to me, therefore, it is a very clear case in favor of the purchaser. As to the observations which were made upon the

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conditions of sale, I construe the conditions as the Lord Chancellor construed them during the argument, namely, that the purchaser is to take, subject to such rights (if any) as the granddaughter was entitled to under the particular provision imposed by the will. I think, therefore, the declaration of the court must be in the terms of the first question; and that the purchaser is entitled to cut timber, not planted, or left standing for ornament.

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ALEXANDER v. SIMMS.

March 2 and 7, 1854.

*Mortgagor and Mortgagee — Mortgage by Part-Owner of a Ship — Right to Cargo.*

A was owner of seven eighths of a ship, and B was owner of the other one eighth; A mortgaged his share; A and B sent out the ship for a cargo at their joint risk in the same proportions as they had in the ship; the ship brought home a cargo, and then the mortgagee took possession, and claimed to be entitled to seven eighths of the proceeds of the cargo, without making any deduction for the expenses of the outfit and voyage. A had assigned all his property to a trustee for the benefit of his creditors:—

*Held*, (affirming a decree of the Master of the Rolls,) that the expenses of the voyage were to be paid out of the proceeds of the cargo before any division took place, and that B, the joint owner, was entitled to one eighth of the residue of the proceeds, the remaining seven eighths of the residue being payable to the trustee of A, to whom he had assigned his property, there being no contract between A and his mortgagee respecting the cargo.

THIS was an appeal from a decision of the Master of the Rolls, made on the 9th of December, 1853, upon a motion for a decree upon a bill praying that a sale might be ordered of the cargo of *The Norman*, lying in the docks at Liverpool, and that the proceeds might be first applied in payment of the expenses and disbursements of, and incident to, the outfit of the ship and her voyage, and for a division of the remainder between the part-owners.

The case may be most conveniently stated in the following narrative form: The plaintiff, Mr. Alexander, was the owner of eight sixty-fourths of the ship *Norman*, and the defendant, Mr. Simms, was the owner of the other fifty-six parts. Mr. Edward How, who was another of the defendants in the suit, was the captain. Before the month of August, 1851, Mr. Simms mortgaged his shares in *The Norman* to the defendant, Mr. Taylor. In August, 1851, Mr. Alexander and Mr. Simms, being then in possession of the ship, sent her to South America for a cargo of guano, from Patagonia. Although there was some dispute about the chartering of the ship for this voyage, it appeared, upon the evidence, that the voyage was undertaken by the part-owners, at their joint risk, in the same proportions as they were interested in the ship. The ship returned to Liverpool, from Patagonia, with a cargo of guano, on the 10th of July, 1852, and was taken into the Albert Dock, where her cargo was discharged, or

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partly so, and notice was given to the dock company, by or on behalf of Mr. Simms, not to part with the cargo without his consent. Mr. Taylor, the mortgagee, also gave a notice to the company, stating that he claimed to be interested in the cargo as being the earnings of the ship on her last voyage, and Mr. How, the captain, also gave the company notice requiring them to detain the cargo till the freight, of which he stated the particulars to be 3*l*. 10*s*. per ton, was paid.

The notices to the dock company were not yet exhausted, for Mr. Alexander, the plaintiff, gave one, which stated that he claimed some interest in the cargo, and desired that he might be informed of any intended removal of it from the control of the company. In the midst of this, Mr. Simms made an assignment to Mr. Ernest of all his property for the benefit of his creditors, and Mr. Ernest, also, served a notice on the company. Mr. Taylor took possession, as mortgagee, of the fifty-six shares in the ship on the 23d of July, and afterwards paid the wages due to the whole crew, except Mr. How, the captain.

When he took possession, the greater part of the cargo was in the dock warehouses, and the remainder was subsequently removed from the ship and quays, and placed there. In consequence of these notices, and the conflicting claims set up to the cargo, the Liverpool Dock Company called upon all parties to come to some arrangement, as by the act of 1851 they were not at liberty to part with the cargo until its liabilities were settled. That act enacts, "that all goods and merchandise warehoused into Albert Docks, shall be subject and liable to the same claims or lien for freight as they were subject to on board the ship or vessel from which they are unloaded." No agreement could be come to, and, therefore, Mr. Alexander filed the bill in this case against Mr. Simms, Mr. Ernest, (his assignee and trustee,) Mr. Taylor, the mortgagee, Mr. How, the captain, and the trustees of the Liverpool Dock Company, praying that the cargo might be sold, and that the residue of the proceeds, after paying the expenses of the voyage, might be divided between Mr. Alexander, the plaintiff, and Mr. Ernest, as the assignee of Mr. Simms, in proportion to their respective shares in the vessel; or in the alternative, that if the court should be of opinion that the plaintiff was not entitled to a share of the cargo, but only to a share of freight, then that the amount of freight might be ascertained, the expenses of the voyage paid thereout, and the residue divided among the plaintiff, Mr. Ernest, and Mr. Taylor, according to their respective interests in the ship. By his decree, the Master of the Rolls declared that the proceeds of the cargo were liable to the expenses of unloading the cargo and of the voyage: and he directed an inquiry as to what was due, and to whom, in respect of such expenses, and declared that, in respect thereto, the plaintiff was entitled to one eighth of the net proceeds of the cargo, and that, in the absence of any contract or arrangement between Simms, the mortgagor, and Taylor, the mortgagee, the plaintiff, as assignee of Simms, was entitled to the remaining seven eighths; and his Honor gave liberty to the defendant, Taylor, to apply with respect to the seven eighths as he should be advised by his counsel of making out his title to them. The costs of the plaintiff, to be paid by

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they were increased by reason of the claim of Taylor to seven eighths of the gross proceeds of the cargo, were ordered to be paid by Taylor, and the residue of the costs were reserved.

Mr. Taylor, the defendant, the mortgagee under Mr. Simms, appealed from this decree. The cause was elaborately argued, the appellant contending that he was entitled to so much of the freight by virtue of his mortgage deed, as would have belonged to his mortgagor, Mr. Simms, namely, seven eighths thereof, without any deduction or abatement in respect of the costs and expenses of the outfit, cargo, and voyage; while, on the other hand, the plaintiff, and such of the other respondents as were in the same interest, insisted that all expenses ought to be deducted from the proceeds of the sale of the cargo before any freight was taken, and that the voyage had been completed by the arrival of *The Norman* in the docks, so that the assertion of the mortgagee, that he had taken possession during the voyage, on the ground that the voyage was not complete by reason of the non-discharge of the whole cargo before his possession was taken, had not been sustained. The cases chiefly adduced in support of the appellant's case, were *Case v. Davidson*, 5 M. & S. 79; *Dean v. M'Ghie*, 4 Bing. 45; and *Kerswill v. Bishop*, 2 Cr. & Jer. 529; while that of *Green v. Briggs*, 6 Hare, 395, was that confidently relied upon by the respondents. The following cases, and many others, were also cited: *Chinnery v. Blackburne*, 1 H. Black. 117, n.; *Lidgett v. Williams*, 4 Hare, 456; *Gibson v. Ingo*, 6 Ibid. 112; *Cato v. Irving*, 5 De Gex & S. 210; s. c. 10 Eng. Rep. 17.

*Roupell, Wilde, and Bevir*, for the appellant, Mr. Taylor, the mortgagee.

*Palmer and Prior*, for Mr. Alexander, the plaintiff.

*Bacon and Rogers*, for Mr. Ernest, the assignee and trustee of Mr. Simms, and for Mr. Simms.

*Follett, Gill, and Smethurst*, for the other parties.

*Roupell* was heard in reply.

Knight Bruce, L. J. Without at all complaining of the length to which the argument in this case has proceeded, I may still be allowed to express my surprise that it has been found possible to say so much. The question divides itself into two branches — one more important, however, than the other. The one is between the appellant and the plaintiff, and the other between the appellant and his co-defendants. On the latter, I am not so clear as on the former; but it is comparatively immaterial; and if it can be shown that the decree can be improved as to it, I shall not object to concur in any alteration, as no doubt we have the power of altering it, although I am not persuaded that any alteration is required. The main question is as to the rights of the appellant in reference to the plaintiff and the

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defendant, who were joint owners of the vessel in question. They were in possession, Alexander being entitled to one eighth and Simms to the remaining seven eighths, and Simms then mortgaged his share for valuable consideration to the appellant, who did not enter into possession, which continued as before with Alexander and Simms, who employed the vessel and sent it to South America to obtain a cargo of guano on a joint adventure, in the same shares between themselves as those in which they were interested in the ship. The vessel was fitted out, and a considerable expense incurred: guano was obtained at some expense; the vessel came back, also, at some expense, and reached the furthest point of her voyage, the port of discharge, and did not merely touch it; so that nothing remained to be done but to remove the cargo on shore. Being then in this condition, the mortgagee took possession, and the question is, what was the effect of that step? I desire not to be understood to give an opinion as to possession taken by a mortgagee before the completion of the voyage—for instance, midway, so as to have been in possession during a substantial part of the voyage. What would have been the consequence of that I give no opinion, because the question does not arise here. The mortgagee, under these circumstances, being in possession of seven eighths of the ship, claims to retain Simms's share until freight has been paid; that is, until he has been paid such a sum as would have been paid for seven eighths of what he calls freight if the vessel had been chartered by a stranger. This is denied by the plaintiff, the other part-owner, who contends that the mortgagee is liable for seven eighths of the expenses: that the voyage was a partnership adventure between the plaintiff and Simms, from which Simms could not have received any thing until after payment of his share of the expenses, and that the mortgagee could not defeat the right of the plaintiff as against his partner. I apprehend that this is the true state of the rights of the contending parties. There was no contract for freight. The contract, express or implied, under which the adventure was undertaken was, that the expenses of the adventure should be paid, and then the surplus of the goods divided between the joint adventurers. What right can the mortgagee have to alter that arrangement? A mortgagee taking possession at the end of the voyage, and when the ship has arrived, may be, and probably is, entitled to the benefit of any contract with his mortgagor under which the goods were shipped and conveyed, but he is entitled to no more. He cannot change the position of the parties to the contract. It might possibly have been otherwise if possession had been taken, say midway, during the voyage. The mortgagee might then have been in a different position, but his position is the same as what I have mentioned. The expenses, in such a case as the present, are the first charge on the cargo, and then the surplus only is divided between the part-owners. The mortgagee cannot, therefore, have any benefit from the cargo except on the terms of paying seven eighths. This appeal, having arisen upon a ground which I think contrary to authority, principle, reason, convenience, and justice, must be dismissed, and the appellant must pay the costs, reasoning, how-

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ever, to him a right to apply for an alteration of the decree, if he shall be so advised, as between himself and his co-defendants.

TURNER, L. J. This case has been very ably argued on behalf of the mortgagee, and I am free to confess that during part of the argument I was greatly embarrassed, but I have ultimately come to the same conclusion as my learned brother. I am of opinion that the decree is right on both points: first, in deciding that the expenses of the voyage are the first charge on the cargo; and secondly, that seven eighths of the cargo belong to the assignee of Simms. As to the first point, the question is, what is the interest of the mortgagee of a ship? I think that such interest is a lien on the share of the ship comprised in his mortgage and on the earnings attributable to such share. Now, what are earnings? There are none in a case like this until the expenses of the voyage are paid, and the appellant in claiming to be free from any share of the expenses is claiming too much. It has been said that a mortgagee is not bound by the contract of the mortgagor, and that is true; but here the question is, what is comprised in the mortgage? It has been also contended that the mortgagee is entitled to the cargo, as a mortgagee would be entitled to the crops upon the land, though severed from it. That, however, is no case involving partnership, but it is a case where an estate passes without reference to any contract with another party. The present case is, in my opinion, governed by *Green v. Briggs*. Then, as to the second point: there was no contract for freight, no charter-party; but the expenses were advanced on the joint account of the adventurers. The case then seems to fall under the principle analogous to the well-known rule, that a mortgagee is not entitled to an account of back rents against a mortgagor in possession. I am of opinion that the decision in this case leaves open every question that need be left open between mortgagor and mortgagee, and I entirely agree that the appeal must be dismissed, with costs.

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*Ex parte* LORD LONDESBOROUGH; *In re* THE DOVER, DEAL, AND CINQUE PORTS RAILWAY COMPANY.

February 24 and 25, 1854.

*Joint-Stock Companies' Winding-up Acts — Contributory — Guarantee to return Deposits — Contribution to one Class of Directors from another Class of Directors.*

Three directors of a projected railway company, with their letters of allotment sent to each allottee a letter saying: "In the event of the act not being obtained, the directors undertake to return the whole of the deposits, without deduction." The Master decided that the three directors who signed the letters were alone liable, and made a call on them

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accordingly for the expenses incurred. One of the three paid the whole, and then sought for contribution from the other five directors, who had not signed the letter:—

*Held*, that the decision of the Master was correct, and that the three alone were liable.

THE facts of this case have been several times reported in the Law Journal Reports. They will be found in *Ex parte Mowatt*, 22 Law J. Rep. (N. S.) Chanc. 578; s. c. 19 Eng. Rep. 414; and *Ex parte Lord Londesborough*, Ibid. 736; s. c. 21 Eng. Rep. 356; besides in the proceedings in various stages at common law. The following short recapitulation of the facts will suffice. The above-named company was formed in 1845, for the purpose of constructing a line of railway from Dover to Deal, the subscribers' agreement being dated the 1st of January, 1846, in which was contained a stipulation that, whether the act of parliament were obtained or not, the subscribers thereto should pay ratably all the costs. The Southeastern Railway Company, by their chairman, suggested that, in order to prompt the more active taking of shares of the Dover and Deal Company, a letter of guarantee should be issued; and, accordingly, a draught of such letter was prepared and sent to Mr. McGregor, who made certain alterations, and, finally, the letter was issued, dated the 24th of January, 1846, which concluded with these words: "In the event of the act not being obtained, the directors undertake to return the whole of the deposits, without deduction." The members of the managing committee of directors were Lord Londesborough, Mr. Beauchamp, and Mr. Gore, (who were present at the meeting at which this letter was agreed on,) and Mr. Brent, Mr. De Burgh, Col. Dixon, Mr. Thompson, and Mr. Lamsden Mackeson, besides others who were removed from the board. The scheme having proved abortive, the company was ordered to be wound up. In various proceedings, the names of all but the before-mentioned eight gentlemen had been removed from the list of contributories. The debts of the company were 167*l.* 15*s.* 11*d.*, but the costs amounted to 2,093*l.*, besides some costs of common law proceedings, amounting to about 600*l.*, and a call was made of 2,350*l.* The three directors who were present at the meeting at which the letter of guarantee was agreed to—namely, Lord Londesborough, Mr. Beauchamp, and Mr. Gore—were declared liable to the whole amount, without prejudice to the right of contribution from the other five last enumerated. The Master, acting under the winding-up order, decided that the three were alone liable, and hence the present appeal. Lord Londesborough having paid the whole amount of the call, his application now was in the nature of an appeal from the Master, but, substantially, to obtain a declaration that the three were proportionally liable with him, Mr. Gore and Mr. Beauchamp, to make up the call.

The common law proceedings were an action between the Southeastern Company and the above company; and that proceedings were in chancery against the Dover and Deal Company. The five directors put in answers, which are very fully referred to in the judgment. The five directors stated a common defence against the claim of Lord Londesborough, that they did not sign the letter, and did not

give authority for its being signed, and were, therefore, not liable; and, then, their additional separate defences were these: Mr. Brent executed the subscribers' contract on the 5th of February, 1846, and was a shareholder for 1,000*l.*, part of which was paid off; he was a director, named as such in the subscribers' contract, attended one meeting of directors after the execution of this deed, and, subsequently, gave up his shares, and was excluded from the direction. Mr. De Burgh was not a subscriber, and was not a shareholder; he was a director, named as such in the subscribers' contract; he attended one meeting only, namely, on the 27th of January, 1846, and did no more, although he never formally retired. Col. Dixon was neither a subscriber nor a shareholder, although he was a director, named as such in the subscribers' contract; he attended four meetings in the early stage of the undertaking, the last being held on the 19th of November, 1845, immediately subsequent to which he went abroad, and never did any other act. Mr. Thompson was a subscriber on the 2d of February, 1846; was a subscriber and a director, named as such in the subscribers' contract; was active as a director after the above-mentioned date, although he never acted before, and alleged that he executed the subscribers' contract on the faith of the guarantee. Lastly, Mr. Lumsden Mackeson was neither a party to the subscribers' contract, nor a shareholder, nor a director named in the contract; he attended several meetings in the early stage of the undertaking, the last of them being held on the 27th of January, 1846, and never had any thing to do with the concern after that day. He never saw the letter of guarantee until after he had ceased to be a director.

The use of the names in the action were, it was submitted, only for conformity; the answers in chancery which had been put in, although they admitted facts which would of themselves be a full adoption of all that the three had done, yet were answers sworn inadvertently and in ignorance of their contents, and, moreover, any such admissions only indicated the adoption by the five of the contract of guarantee as between the Southeastern Railway Company and the Dover and Deal Company, and could not be treated as an adoption of that contract of guarantee, which Lord Londesborough and the other two gave to each subscriber. As to such of the five as were non-subscribers, it was additionally urged that Lord Londesborough could not recover any thing against them, because, by the terms of the subscribers' contract, they were indemnified from costs.

*Bacon, Clarke, and Honyman*, appeared for Lord Londesborough. Their arguments are so fully discussed in the judgment, more particularly in that of Lord Justice Turner, as to render a statement of them here unnecessary.

*Cairns*, for Mr. Brent and Mr. De Burgh.

*Follett and Goodeve*, for Col. Dixon and Mr. Thompson.

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*Mackeson, for Mr. L. Mackeson.*

*Bacon, was heard in reply.*

Knight Bruce, L. J. I doubt very much whether the order purporting to direct that this company, or alleged or intended company, should be wound up, ought to have been made, and whether being made it ought to stand. That, however, is not the question now before the court. We must act upon it, as matters are, as if it were a subsisting and a valid order; it is a subsisting order, and we must treat it, for the present purpose, as a valid one. A call has been made by the Master upon three gentlemen, and those only, who were shareholders in this company. As I understand, each of the three gentlemen was a shareholder—not merely a director, but a shareholder also. One of these gentlemen, Lord Londesborough, complains of the call only to this extent, that five other gentlemen, respondents on this occasion, or some one or more of those five, ought to have been associated with himself, with Mr. Gore, and Mr. Beauchamp in the call, for the purpose of being jointly liable with him. That is the question now under investigation and for decision before us, and that alone. The question is not whether, if Lord Londesborough shall pay this call, he will be entitled to sue the five other gentlemen, the respondents, or any one or more of them, for contribution—that is not the point—he may or may not be so entitled: the question is, whether these gentlemen are contributories to the company, or alleged company, purporting to be ordered to be wound up. Now, three of the five respondents it is, as I apprehend, quite impossible so to consider, because it is now established that as to three of these gentlemen, not one of the three ever took, or accepted, or had a share, in any sense of the expression. It is true, they were in such positions as, to use a common phrase, they might have had shares for the asking for them; but the application was not made; not one of them was legally or equitably invested with any share. They may or may not be on the Master's list of contributories. In my opinion, if they are there, they ought not to be there; and it has been decided that if, upon an application to the court in respect to a call, it shall appear, in a satisfactory manner, that any of those on whom the call purports to be made, though on the list of contributories, ought not to be on the list of contributories, the call ought not to be enforced against such parties. In my opinion it is manifest now, that Col. Dixon, Mr. De Burgh, and Mr. Mackeson, are in that situation that not one of them can properly be considered a contributory, and that not one of them is or can be made liable to this call. Those three gentlemen therefore are, in my opinion, to be dismissed from the present application. The question, then, is confined to Mr. Brent, an alderman of Canterbury, and Mr. Joseph Thompson, a gentleman who is or was in trade in the city of London. The question is, whether they are to be associated in this call. Now, the three gentlemen, of whom one makes this motion, entered into a certain engagement to return the deposits of all those who might become

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shareholders without deduction. That intention, that promise, that agreement, must be taken to have been communicated to all those who became shareholders. Did that promise, did that undertaking bind, at the time when it was made, any but the three persons promising? I apprehend, most clearly not. It was beyond the powers of the directors as directors; no one could be affected by it except the three; no one was affected by it but the three; no one is affected by it but the three, except so far as any other persons, or any other person, may have, by subsequent ratification or adoption, become associated in the promise for the purpose of equal liability. Now, the burden of proof in that respect is wholly upon those who make the allegation, because, in the absence of proof, it is clear that the liability only falls upon the three. The question is, whether Lord Londesborough does prove that allegation. Now, Mr. Brent and Mr. Joseph Thompson stand each of them in two positions: one as shareholder, and the other as director. Considered merely as shareholders, they are entitled to the benefit of the promise made by the three. It is in the capacity of directors that they are to be, if at all, associated in a liability to the performance of the promise. Now, each of them denies that he adopted the promise, or became, or intended to become, liable to it. Notwithstanding that denial, it is asserted that the acts which they did amounted to an association of themselves in the promise, whether it be called ratification, sanction, adoption, or by any other term. But, as it seems to me, all the acts that have been done are equally consistent with either supposition. It is at least as natural and reasonable to suppose that they acted as directors, meaning that the contract with the Southeastern Railway Company should be executed, but that they should not come under a liability to indemnify the shareholders themselves, if that intended combination between the two companies should not take effect, as that there was a different intention. I have hardly seen an act which is not equally referable to either intention; and if I am to consider the probabilities, the probability certainly is, that neither of them would without necessity undertake an onerous liability under which he was not benefited, and which he might avoid. It would require very clear and satisfactory evidence to prove that a man did intend to place himself, and did, consequently, place himself, in such a position. Now, I can see no such plain or clear evidence of intention; I can see nothing, as I said, but a series of acts consistent either with the existence or the absence of such an intention, and it is impossible for me, therefore, to ascribe that force to what has been done. Reliance has been placed upon the declaration in the action, and upon the answers in the cause; and, for the present purpose, I will assume the declaration to be, in evidence, as an admission, or to be capable of being proved as an admission,—without, however, giving any opinion on that point. The answers certainly are so, but the declaration was a declaration in an action in which only Mr. M'Gregor, as I understand it, on his own behalf, or on behalf of the Southeastern Railway Company, was a defendant, and the answers were in a cause in which Mr. M'Gregor in the same character was, as I under-

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stand the facts, the only plaintiff. They are, therefore, not in the nature of estoppels; they are not here to be considered upon those rules of pleading which apply to proceedings of that description between the parties to the particular litigation. They are here used for another purpose, and are merely admissions in the technical sense of that phrase, when we are speaking of the law of evidence. And, as to those, probably the rule cannot be better expressed than it was by Mr. Justice Bayley, in the case of *Heane v. Rogers*, 9 B. & C. 555; s. c. 4 Man. & Ry. 486, where he says: "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him, but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition. In such a case, the party is estopped from disputing their truth with respect to that person, and those claiming under him, and that transaction; but as to third persons he is not bound. It is a well-established rule of law that estoppels bind parties and privies, not strangers." Now, I am of opinion that this case is not brought within the exception that Mr. Justice Bayley mentions; that, accordingly, it is competent to each of the persons whose answers have been read against them, to show that the answers were, through mistake or otherwise, inaccurate, and we have to consider the matter here as merely in a civil point of view, and not for any purpose directly or indirectly criminal. Now, the evidence in the cause, besides the declaration and the answers, clearly satisfies me that the facts must be considered as they would have been independently of the declaration, and independently of the answers. That being so, I can see no sufficient ground upon which Lord Londesborough, on whom the burden of proof lies, can say to Mr. Brent, or to Mr. Thompson, that either of them did as a director come under that liability, under which there was no obligation upon either to come; and since as shareholders they are entitled to the benefit of the promise, and as directors they have not come under an obligation to perform it, I am of opinion that the Master is wholly right.

TURNER, L. J. The parties against whom the present motion is made are five in number, and, I believe, that as to two or three of them there is, in substance, the same case against them resting upon wholly different grounds; and I believe, therefore, the most convenient course will be to take the case of the several respondents to the present application in the following order: The first of these cases is that of Mr. Brent, who, it is said, ought to be charged with some portion or some share of this sum of 2,350*l*. It appears that Mr. Brent attended a meeting on the 26th of February, 1846, and also some subsequent meetings, but he was not present at the meeting of the 24th of January, 1846. Well, now, three points are urged as to Mr. Brent, for the purpose of fixing him with a liability to a portion of this call. In the first place, it is said, that he had been appointed a director of this company, or one of the members of the committee

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of management of the company, on the 1st of November, 1845; that he attended at the subsequent meetings after the resolution of the 24th of January, 1846, had been passed, and that he took no steps for the purpose of disturbing that resolution. In the second place, it is said that he was one of the plaintiffs in the action brought against the chairman of the Southeastern Railway Company, and, thereby, adopted the arrangement which had been made between the Southeastern Railway Company and the Dover and Deal Railway Company, part of which arrangement is said to have been that the directors of the Dover and Deal Railway Company should undertake with their shareholders that they should be responsible for the return of the whole amounts of the deposits. And thirdly, it is said that Mr. Brent in his answers has admitted, and in the answer put in by him to the bill, filed by the chairman of the Southeastern Railway Company has admitted, his full acquiescence and agreement in the arrangement. And then it is also said that there were some resolutions of the 26th of March, 1846, and the 1st of April, 1846, which had reference to an application to the Southeastern Railway Company for a copy of the minute of the order by which they had agreed to the terms of the arrangement with the Dover and Deal Railway Company. All these facts are said to show such a case of concurrence on the part of Mr. Brent in the arrangement with the Southeastern Railway Company, and in the undertaking that the directors of the Dover and Deal Railway Company should become liable to their shareholders for the return of the deposit, as to fix the liability on Mr. Brent. Now, examining these grounds severally: in the first place, the earliest attendance which takes place at the board of the Dover and Deal Railway Company on the part of Mr. Brent, after the passing of the resolution of the 24th of January, 1846, is on the 26th of February, 1846. It is in evidence before us that the allotment of the shares in this company was completed on the 2d of February, 1846; and the allotment having been completed on the 2d of February, 1846, the shares issued, and the letters accompanying the shares sent out with the issue of the shares, I should be glad to know what act could have been done on the part of Mr. Brent to undo that which had already been done by the act, or in pursuance of the act, of Lord Londesborough and the other two members of the committee of management who had resolved that those letters should be sent out. There were no means by which Mr. Brent could, on the 26th of February, 1846, have undone a mischief which had been already done, if mischief it was, by Lord Londesborough and the other two members of the committee of management as early as the 24th of January, 1846. I think, therefore, that as against Mr. Brent, no reliance at all can be placed on his attendance on the 26th of February, or on his attendance at the subsequent meetings. Then, it is said, that Mr. Brent was a plaintiff in the action which was brought against the chairman of the Southeastern Railway Company for the purpose of rendering the Southeastern Railway Company liable to the damages which were incurred by the Dover and Deal Railway Company, or liable to pay to the Dover and Deal Railway Company what they had undertaken to

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pay their shareholders. For what purpose was that action brought? That was an action brought by the directors of the Dover and Deal Railway Company, of which Mr. Brent had been one of the directors at the time when that arrangement had been made. Suppose Mr. Brent had refused to bring that action, would it not be that he, being a director of that company, was bound to bring the action for the benefit of the company, upon having an indemnity for the use of his name? And if we consider this action, what is the nature of it? The nature of the action is to recover against the Southeastern Railway Company; and I want to know whether it is to be held that, because parties concurred in an action to recover against the Southeastern Railway Company, it therefore follows that they had agreed, as between them and other directors of their own company, to indemnify the shareholders of their own company? The obligation to indemnify depends not upon the contract between the Southeastern Railway Company and the Dover and Deal Railway Company, but upon the issuing of the letters by the committee of management of the Dover and Deal Company to the allottees of the shares in that company. It is by virtue of the issuing of the letters of allotment, accompanied by the letter of guarantee, that the right of action would arise to any shareholder in the Dover and Deal Railway Company against the directors of that company, and not by virtue of the contract between the Southeastern Railway Company and the directors, who entered into the contract with the Southeastern Railway Company. Now, when we look to the answer of these defendants, they state "that they and the committee of management entirely acquiesced in and accepted the terms stated in the letter of the 24th of January, as the plaintiff well knew; (that is, in answer to Mr. M'Gregor's bill; ) and that, under the circumstances aforesaid, and relying on the promise and assurance, as aforesaid, of the plaintiff, the said committee of management of the Dover and Deal Railway Company, including these defendants, proceeded to allot the shares in the company, and each letter of allotment was accompanied by a printed copy of the letter of the 24th of January as finally approved of and settled by the plaintiff." They concurred, then, in the terms of the arrangement, and the terms of that arrangement are terms by which certain of the directors had undertaken with the Southeastern Railway Company that all the directors should guarantee the shareholders. But that arrangement had actually been carried into effect to the extent of the letters having been issued before the time when Mr. Brent is shown to have been in any way privy to that arrangement. How, therefore, can any thing which is contained in that answer at all have any effect on Mr. Brent? So, again, with respect to the resolutions of March and of April. Those resolutions are entered into for the benefit of the company, calling on the directors of the Southeastern Railway Company to produce their resolutions for the purpose of founding the action against them in order that they may be made liable for the deposits which had been paid by the shareholders in the Dover and Deal Rail-

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way Company. It appears to me, therefore, that the case against Mr. Brent fails.

The case of Mr. De Burgh stands in somewhat different circumstances, and, in one respect, somewhat more favorable to Lord Londesborough's case, because as to Mr. De Burgh, putting the evidence out of the question, the case must still, as against him, stand on his answer. If you look at his answer, you find that all that he did was attending the meeting on the 27th of January. Now, as to his attending that meeting on the 27th of January, nothing whatever passed at that meeting on the subject of the contract, or arrangement between the Southeastern Railway Company and the Dover and Deal Railway Company; but there is this to be said on the part of Lord Londesborough, that at that period the allotment had not been completed; and the case therefore differs from Mr. Brent's case, because the allotment had been actually completed before Mr. Brent was brought into connection at all with the company; but as to Mr. De Burgh, the allotment had not been completed. But then the question is, whether the circumstance of that allotment not having been completed at that time is to make Mr. De Burgh liable with Lord Londesborough in respect of the undertaking contained in the resolution of the 24th of January, (or rather in the letter consequent upon that resolution,) to be liable to the shareholders to return the deposits. Now, the order had been actually given by the meeting on the 24th of January before this meeting of the 27th of January, when Mr. De Burgh attended; and I do not see how, it not being proved that he took any part whatever in the allotment of the shares, any liability is to be fixed upon him as between him and Lord Londesborough on the mere ground that he did not interfere upon the 27th, for the purpose of stopping that act from being done, which Lord Londesborough had directed to be done upon the 24th. With reference to the action and with reference to the answer, the case as to him stands upon precisely the same footing, according to the view I take of it, as the case against Mr. Brent.

Now, the next case, that of Colonel Dixon, is certainly the weakest of the whole; because, as to Colonel Dixon, what appears is, that the last meeting which he attended took place on the 19th of November; this arrangement with the Southeastern Railway Company not being made until the month of January, and the letters under which the liability arose to the shareholders in the Dover and Deal Company, not being issued until the 24th of that month; and the only observation which I have heard in the case which could at all affect the question as to the liability of Colonel Dixon is, that it was said that Colonel Dixon was a party to a negotiation and to the arrangement between the Southeastern Railway Company and the Dover and Deal Company. But it is an immediate answer to that observation that Colonel Dixon was not a party to the conclusion of that arrangement. There is nothing to show that he ever concurred in the conclusion of that arrangement, which was completed, or carried out at the meeting of the 24th of January.

Then, as to Mr. Thompson, the same observations which I have

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made on the other parts of the case apply as to him. He does not come in until the 9th of February. It is true that he is a party, and an active party in the commencement of the action against Mr. M'Gregor. He seems to have directed that action to be brought; but, as I observed in Mr. Brent's case, that action was brought for the benefit of the company, and does not, in my mind, import, or create any liability on the part of Mr. Thompson to the shareholders in the Dover and Deal Company.

As to Mr. Mackeson, I think his case stands exactly on the same footing as the case of Mr. De Burgh; and looking, therefore, at the cases of these several parties, it does not appear to me that Lord Londesborough has at all established his case against all, or any, or either of them. The principles of this case are, perhaps, a little affected by the decision in the case of *The Charitable Corporation v. Sutton*, 2 Atk. 400. There there was a committee of management. Of that committee some of the members did acts far beyond their authority, others stood by and did not interfere. Lord Hardwicke said, that those who had done the acts were first liable, and that the others were secondarily liable. And, applying the principle of that case to the present, the acts done here are done by the resolution of Lord Londesborough and the two others who concurred with him, passed on the 24th of January. If there be any liability on the part of the other directors, that liability arose from their not having interfered to disturb those acts which had been done by Lord Londesborough and the other two; and I adopt, therefore, the principle of *The Charitable Corporation v. Sutton*, in that respect, that if these parties were liable at all, they would be liable in the second degree to the shareholders of the company; and if, as between them and the shareholders of the company, they would be liable only in the second degree, I am at a loss to see on what ground the party liable in the first degree can establish a charge against the parties liable in the second degree.

KNIGHT BRUCE, L. J. Lord Londesborough will not have to pay any increase of costs occasioned by the master's rejection of the answers as evidence; but with that exception, I think, he must pay the costs.

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NEALE v. DAVIES.

March 28, 1854.

*Trustee and Cestui que Trust — Acceptance of Trust.*

Where a trustee accepts the trust of a fund, with the knowledge that it is doubtful whether it ought to be held upon such trust, he is nevertheless entitled to come to the court for its direction whether the trusts ought to be executed:—

*Held*, by Turner, L. J.; Knight Bruce, L. J. entirely dissenting.

Where trustees accept such a trust, with knowledge of the doubt, and with the same and no

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more knowledge, are called upon to part with the fund, by the *cestuis que trust*, they are bound in morality to do so; and an adverse claimant would have no claim against them personally after they had parted with the fund in conformity with the trusts on which they accepted it — per Knight Bruce, L. J.

The question having been raised in a suit between the trustees and *cestui que trust* of the deed, one of the Vice-Chancellors refused to pronounce a decree, but ordered the cause to stand over, with liberty to the plaintiff, the *cestui que trust*, to amend, by adding parties; and their lordships differing in opinion, the order of the court below was affirmed.

THIS was an appeal from a decision of Vice-Chancellor Wood, on a motion for a decree. Captain Nisbet died possessed of 31,635 francs French rentes. By his will, he was alleged to have given his daughters shares in his property for life, with trusts for their children; his mother, Lady Nelson, and Lord Vernon were the trustees who accepted the trusts of the will, and the mother was appointed executrix. By a deed dated the 28th of March, 1831, made between Lady Nelson of the one part, and Lord Vernon of the other part, after reciting that the lady was entitled, as executrix of her son, to the rentes, and intended forthwith to have them transferred into the joint names of herself and Lord Vernon, but as Captain Nisbet owed her 7,000*l.* she intended that 10,800 francs of the rentes (the amount which 7,000*l.* would buy) should be appropriated in satisfaction of the debt, and be held upon the trusts after declared, which trusts were for the benefit of the three daughters of Captain Nisbet. Lady Nelson did not cause the transfer to be made, and by her will appointed executors, who, after her death, transferred the whole rentes into the name of Lord Vernon. Lord Vernon made a will and appointed executors, and died in 1835. On the 16th of February, 1844, Frances Nisbet, the eldest daughter of Captain Nisbet, attained twenty-one; and on the 29th of May, 1845, Lord Vernon's executors sold the 10,800 rentes, and invested the produce in consols in the names of Mr. Davies and Mr. Esdaile, who were, by deed dated the 2d of June, 1845, appointed new trustees of the settlement of 1831, and executed a declaration that they held the fund upon the trusts of that deed. Miss Frances Nisbet, previous to her marriage, which took place in December, 1846, settled her property by assignment to trustees. The trustees, in 1854, called upon Mr. Davies and Mr. Esdaile for a transfer, which not being made, they filed the present bill to enforce it. The cause was set down for hearing on a motion for a decree, when Vice-Chancellor Wood directed it to stand over, with liberty to amend by adding parties. The plaintiff appealed. The defendants, by their affidavits, stated that they accepted the trusts at the request of the family; that they inquired into the state of the family, and the rights of the parties, and found that Captain Nisbet's daughters were entitled, under his will, to life interests in their shares, with trusts for their children; that although they called for it, no evidence of the truth of the recital in the deed of 1831, was produced; that if such recital were untrue, the produce of the 10,800 rentes still formed part of Captain Nisbet's personal estate; and that they had been advised by counsel that they could not make the required transfer without the sanction of the court.

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*Roll and Prior*, for the plaintiff, the appellant.

*James and Selwyn*, for the respondents.

TURNER, L. J. It is impossible to help feeling for the painful position in which the family are placed, but I am nevertheless of opinion that the order of the Vice-Chancellor is right. It is true that the trustees accepted the property upon the trusts of the deed of settlement, but it is a question whether it ought to be held on those trusts. If a trustee has accepted a fund upon certain trusts, and then receives information making it doubtful whether the fund ought to be held upon those trusts, he has a right to come to the court for its direction whether the trusts ought to be executed. How does his knowing of the existence of this doubt at the time when he accepts the trusts alter the case? I think that the case may be thereby altered as regards the costs, but not otherwise. Suppose a trustee accepts a fund on certain trusts, and then a person claims the fund by an adverse title, and gives notice of his claim to the trustee, can the trustee safely pay away the fund to his *cestui que trust*? I think not. If all the persons making the claim were adult, I think the trustee might make himself safe by giving them notice that if they did not, within a reasonable specified time, take proceedings to enforce their claim, he should proceed to distribute the fund according to the trusts on which he held it; but here infants and classes of unborn children are concerned. I have often had occasion to consider the question of the liability of trustees under such circumstances, and have frequently advised them to carry the trusts into effect upon receiving an indemnity; but this is not a case for indemnity. I think that the decision of the Vice-Chancellor was right, although I regret it.

KNIGHT BRUCE, L. J. I dissent entirely. In 1845, the family request the defendants to let the fund be transferred into their names, upon the trusts of the settlement; the defendants assent, and execute a declaration of trust. In 1854, the defendants, with exactly the same knowledge, neither more nor less than when they accepted the trust,—with the same information, neither more nor less,—with the same grounds of belief, neither more nor less,—say to their *cestuis que trust*: “There is an adverse claim; we will not execute the trust; we will retain the fund till the claim is settled;” I think that this conduct is contrary to morality, propriety, and honesty. I am of opinion that if, by paying away the fund to their *cestuis que trust*, they would make themselves personally responsible to the adverse claimant in the event of his claim being successful, they were bound to incur such responsibility. But I am clearly of opinion that they would not incur it. The adverse claimant might attach the fund if in their hands; but I am of opinion that there would be no claim against them personally, after they had parted with it, in conformity with the trusts on which they accepted it. As, however,

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the two judges of this court take opposite views, the decision of the Vice-Chancellor will stand.

*The appeal was then dismissed, but the costs were directed to be costs in the cause.*

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SMALL v. CURRIE.

March 21, 22, 23, and 30, 1854.

*Principal and Surety — Indemnity — Discharge of Surety — Partnership.*

Two persons entered into partnership, and one gave to the other the joint and several bond of himself and of another person as his surety, indemnifying the other partner from all loss from the partnership business. By the articles of partnership, it was to continue for five years, and it was agreed that if either partner should retire and the other continue the business, the latter might take the former's share of the assets at a valuation; and it was also agreed that if at the end of the partnership either partner should wish to carry on the business, and should not take the share of the other at the before-mentioned valuation, the assets should be realized, the debts paid, and the surplus divided between them. The partnership expired by effluxion of time, neither partner having retired. At the end of the term, the partners continued the partnership for a year and a half or more. The surety never was consulted on this proceeding, although he was cognizant that the concern had not been wound up at the end of the term. The partner (the obligee in the bond) retired, leaving the whole assets in the hands of the other to wind up the concern, and the partner (the obligor) three months afterwards became bankrupt and absconded with part of the assets, and the obligee partner paid off all the liabilities. The surety died, and the obligee partner sued his executor on the bond, and a bill was filed to restrain the action: —

*Held*, (overruling the decision of one of the Vice-Chancellors, who had dismissed the bill, with costs,) that as the partnership affairs had not been wound up at the end of the five years pursuant to the stipulations of the deed, the surety and his estate were discharged from all liability on the bond, and a perpetual injunction was ordered to restrain all proceedings upon it as against the surety.

THIS was an appeal from an order of Vice-Chancellor Kindersley, 23 Eng. Rep. 633. The case arose upon the question of liability of a surety on a bond of indemnity. A short narrative of the facts leading to the giving of the bond will suffice. Colonel Joliffe, the owner of property in and about Petersfield, which borough he represented in parliament, in and before 1833, had employed, as his agent, Mr. Hector, the only banker in the place. These gentlemen, however, differed, both politically and personally. Mr. Currie became the agent of the Colonel, and on one occasion Mr. Hector became M. P. for Petersfield, in lieu of Colonel Joliffe. In the borough, the latter had two strenuous partizans, Mr. Lipscombe, a retired farmer and a man of substance, and Mr. Butterfield, a farmer, who had married Mr. Lipscombe's niece. Early in 1833, the establishment of an opposition bank in the borough was suggested, and in April in that year the suggestion was acted on, and Colonel Joliffe, Mr. Currie, and Mr. Butterfield formed the firm — the latter being the managing partner, at a salary; and for the due performance of his duties, Mr.

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Lipscombe became his surety. This partnership was continued long after the time originally agreed; but on its continuance, Mr. Lipscombe did not become surety for Mr. Butterfield. On the 20th of August, 1842, Colonel Joliffe retired from all Petersfield banking matters, and a deed of dissolution was executed on that day.

The contract of partnership in respect of which the present litigation arose, was entered into on the same day between Mr. Currie and Mr. Butterfield, whereby it was stipulated that the partnership should continue for five years from the date of the deed, that Mr. Butterfield was to have all the profits up to 300*l*. a year, and that the surplus profits were to be equally divided between him and Mr. Currie; and the new firm took upon themselves the debts and liabilities of the old firm as they then stood. By the 16th clause, it was thus provided: "That in case either of them, the said J. Currie and C. C. Butterfield, shall die before the expiration of the term of the said partnership, or in case at the expiration or other sooner determination of the said partnership either of them, the said J. Currie and C. C. Butterfield, shall retire from the said banking business, and the other of them shall be desirous of carrying on the same, then the share and interest of the partner so dying or retiring from the said business of and in the capital stock, credits, and effects of the said partnership, may be taken by the other of them at the value," &c., (to be ascertained as therein stated.) The 17th clause was as follows: "That if at the expiration of the term of the said partnership, or at any sooner determination thereof, either of them, the said J. Currie and C. C. Butterfield, shall be desirous of carrying on the said business, and shall neglect or refuse to purchase the share of the other of them quitting the business or dying, and pay the value thereof in manner aforesaid, then a general rest or account shall be made and taken of the said partnership stock, credits, and effects, and the said stock and effects shall be converted into money, and the said credits collected in; and out of the money to arise from the said stock, credits, and effects, all the debts and demands justly due and owing by or from the said partnership shall be, in the first place, fully paid and satisfied, and the surplus or residue of the said moneys shall be forthwith divided between the said partners, their executors, or administrators, according to their respective rights and interests therein." By a joint and several bond of even date with and reciting the partnership articles, Mr. Butterfield as principal, and Mr. Lipscombe as surety, became bound to Mr. Currie in the penal sum of 10,000*l*. conditioned for the due performance by Mr. Butterfield of all the stipulations in the partnership articles, (which was the extent of the bond given by them to Colonel Joliffe and Mr. Currie at the time of the partnership of Joliffe, Currie, and Butterfield,) and also to indemnify Mr. Currie against all loss that might, under any circumstances and from any causes whatever, arise in the course of the business, including therefore any moneys owing to the partnership in respect of the debts transferred from the old firm to the new. The recitals and conditions of this bond are fully set out in the judgment of Lord Justice Knight Bruce. The partnership expired on the 20th of

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August, 1847, but the business of the bank was continued by Messrs Currie and Butterfield until the 3d of April, 1849, when the partnership transactions between them, finally ceased: Mr. Currie leaving the assets under the sole control of Mr. Butterfield. Mr. Lipscombe, the surety, had died in October, 1848, having, by his will, appointed Mr. Small his executor. Mr. Butterfield was adjudicated bankrupt in July, 1849, and soon afterwards he absconded, taking with him a considerable amount of the assets of the late partnership. Mr. Currie, finding that the liabilities of the bank exceeded its remaining assets, discharged those liabilities, and compliance with his demand of payment on the bond having been refused by Mr. Small as Mr. Lipscombe's executor, commenced an action against him for recovery of the amount of loss sustained in respect of the transactions of the bank, and Mr. Butterfield's misappropriation of its assets. Upon this, Mr. Small filed the present bill, which, after charging that Mr. Currie had prepared the bond as the solicitor of Mr. Lipscombe, and that it was fraudulently obtained, insisted that the plaintiff, as executor of Mr. Lipscombe, was entitled to have the same delivered up as fraudulent and void, or that it ought to be declared by the court that the bond should be rectified or reformed, and made conformable to the bond of 1833 given to Colonel Joliffe and Mr. Currie, and that the liabilities, if any, of Mr. Lipscombe's estate ought to be ascertained on the footing of that bond. The prayer of the bill was conformable to these charges and allegations, and an injunction to restrain the action was also prayed. Mr. Currie put in three answers to the bill; in the first and second of which he stated that the bond in question corresponded with the bond given to the old firm; but in the third, his supplemental answer, he stated this to be a mistake, but alleged his belief that Mr. Lipscombe knew of the difference between the two bonds when he executed that in dispute. The common injunction issued, and no motion was made to dissolve it.

The evidence in the cause may be stated to this effect: that the draft articles of partnership and the draft of the bond were prepared by Mr. Currie himself, in London, he being a solicitor practising there; that they were in the form he required; that they were approved by him on his own behalf; that they were sent by him to Mr. Butterfield, at Petersfield, for his approval of the deed, and for the approval of himself and Mr. Lipscombe of the bond, both those gentlemen residing there; that they were approved respectively by them, and were returned to Mr. Currie, in London; that no solicitor was employed by either to peruse the drafts on their behalf; that when the deed and the bond were respectively executed by Mr. Butterfield and Mr. Lipscombe, they were returned to Mr. Currie, who executed the deed; that the business of the bank was carried on after the expiration of the five years in the ordinary way, although only for the purpose of winding up its affairs; that fresh deposits were received from old as well as from new customers; and that the requisitions of the 16th and 17th clauses of the articles of partnership were not complied with, a fact which was known to Mr. Lipscombe.

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Upon such materials, the cause came on for hearing before Vice-Chancellor Kindersley, when the plaintiff's counsel argued that, under all the circumstances of the case, Mr. Currie was to be considered as the solicitor of Mr. Lipscombe in the matter of the bond, for which reason it became his duty to his client fully to explain the nature of the instrument, and also the circumstances and conditions of the partnership business between himself and Mr. Butterfield, the amount of its assets and liabilities, and all the particulars relating to it. It was further urged that, even supposing Mr. Currie could not be considered as Mr. Lipscombe's solicitor, still, it was his duty, in taking so peculiar and onerous a bond from that gentleman, to explain to him, in his character of surety, the exact effect of the bond, the character and position of the debts due to the firm when the bond was given, and which debts the firm had undertaken to pay. And, lastly, it was urged that, as Mr. Currie had failed in the performance of his duty, whether as solicitor for Mr. Lipscombe or as obligee, in taking from him such a bond of indemnity, he ought to be restrained from enforcing his legal rights under it. The Vice-Chancellor did not concur in either view, and dismissed the bill, with costs, whereupon the plaintiff appealed.

*Bacon and Giffard*, for the appellant. As it is admitted on all hands that no solicitor advised Mr. Lipscombe as to the consequences of this most stringent and unusual bond—a bond not only making him liable for Mr. Butterfield's misconduct in the business, but making him answerable for all losses in the trade—it was the bounden duty of Mr. Currie to explain its whole operation, a duty which Mr. Currie himself admits he did not perform. It was the duty of Mr. Currie to do this, as he was the solicitor who prepared the bond, and in so doing acted as the solicitor of Mr. Lipscombe. In both the answers which Mr. Currie has put in, before his supplemental answer, he states that the second bond was to the same effect as the first; but in the supplemental answer, to put in which he obtained the special leave of the court, he says that he believes that Mr. Lipscombe knew the difference between the two bonds. This, although not showing more as against Mr. Currie than a mistake in his first and second answers, is almost irresistible as leading to the conclusion that the matter was so represented to and understood by Mr. Lipscombe. But whether as solicitor for Mr. Lipscombe or as obligee, taking from him so onerous a bond in his character of surety for Mr. Butterfield, it was the imperative duty of Mr. Currie to explain the exact position of the business, so as to account for the difference between the two bonds, which Mr. Lipscombe would naturally expect to be to the same effect, and more particularly so as he was not required to enter into any bond on the continuance of the old partnership beyond its original term. Admitting, however, for the sake of argument, that the bond was originally good, still, by the conduct pursued towards him, he was released. What he agreed for was, to indemnify Mr. Currie against all losses in the business up to August, 1847, that being the period at which the partnership would expire; and by the articles of

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partnership it was, by the seventeenth clause, provided that the business should then be wound up. Whatever right Mr. Currie and Mr. Butterfield might have, and no one disputes their right, to carry on the business after the end of the term for which the articles of 1842 were entered into, the effect of their doing so was to relieve Mr. Lipscombe from his liability as surety. If the business had been wound up in 1847, the estate of Mr. Lipscombe would have had the benefit of having the assets of the bank applied as they then stood in exoneration of his liability on the bond; while now, by being deprived of this, the plaintiff would be driven, if the court should hold him liable at all, to show that he had been actually damnified by such a course of proceeding. *Watson v. Alcock*, 17 Jur. 568; s. c. 19 Eng. Rep. 239. The case of *Bonar v. Macdonald*, 3 H. L. Cas. 226, s. c. 1 Eng. Rep. 1, was a case wholly in point with that now before the court, and nearly identical with it, and the later case of *Railton v. Mathews*, 10 Cl. & F. 934, was a further authority, both being decided by the House of Lords, in favor of the total discharge of the plaintiff from liability as a surety upon his bond.

KNIGHT BRUCE, L. J. The first question is, whether, in the month of July, 1847, Mr. Lipscombe was, in law and equity, bound by the bond according to its purport and terms. I am of opinion, as I believe my learned brother is also, that Mr. Currie did not stand in such a relation to Mr. Lipscombe as that Mr. Currie is under the burden, in supporting the bond, of doing more than proving, by admission or otherwise, the execution of the bond by the obligor. That being done, the burden is, in my opinion, upon the plaintiff to show that there are equitable circumstances entitling the plaintiff to have the bond considered as a nullity against him. We are of opinion that he has not proved such a case, and that the just result of the evidence is this: that Mr. Lipscombe must be taken to have executed originally with the intention of binding himself by the bond according to its purport and tenor. Therefore, counsel for Mr. Currie may argue their case on the basis that, in July, 1847, Mr. Lipscombe was bound by the terms and tenor of the bond.

TURNER, L. J. Before the plaintiff can be entitled to be relieved from the bond, it is incumbent upon him to show that Mr. Currie was the solicitor for Mr. Lipscombe in the matter. At present, there is no proof that such was the case. That Mr. Currie acted as the solicitor of the bank in preparing the bond is clear; but that does not establish, as a fact, that he was acting as the solicitor for Mr. Lipscombe. We must, of course, presume that Mr. Lipscombe knew the contents of the instrument he executed; and there is the same presumption of knowledge on the part of Mr. Lipscombe as on the part of Mr. Currie, of the difference between the two bonds. Mr. Lipscombe, moreover, lived more than five years after his execution of the bond, and never questioned it. The plaintiff has not, so far, made out a case for being relieved from the bond.

*Rolt and Elmsley*, for the defendant. The plaintiff has not proved the fraud he sets up against the bond, and so much, therefore, of this bill ought to be dismissed, with costs. The circumstances which have occurred do not operate to release the estate of Mr. Lipscombe from liability, for his contract of suretyship was to indemnify Mr. Currie from the liabilities of the firm during the five years. At the end, therefore, of the term, the partnership being continued, the estate of Mr. Lipscombe remains liable for the old debts, on the footing of the assets being realized in the common way when partners embark the assets of their old partnership in the business of a new one. This is, however, upon the assumption, which is not admitted, that the business was carried on, in its ordinary and proper sense, after the end of the term. It was not so carried on. It was merely continued for the purpose of winding up its concerns; and although such continuance lasted more than a year and a half, and although further deposits were received from old customers of the firm, and new customers were permitted to deposit their money, still, these circumstances were necessary for the due carrying on of the business for the purpose of winding up, as it was quite impossible to bring the transactions of a bank to a close at once. Although the seventeenth section of the partnership articles has been relied on by the plaintiff, it is submitted that it must be read in conjunction with, (under the circumstances which took place) in continuation of, the sixteenth clause; and then it will be found that it does not apply to the case of both parties choosing, whether for the purpose of trade or for the purpose of winding up, to continue the business. But whether this be so or not, Mr. Lipscombe perfectly well knew, and it is not denied that he knew, what took place in 1847; and as he took no steps showing that he disapproved of them, and claimed on that account to be discharged from liability on the bond, so now it is too late for his representatives to come and claim that his estate shall be released.

*Burdon*, on the same side and in support of the same line of argument, cited *Howell v. Jones*, 1 Cr. M. & R. 97, and *The Bank of Scotland v. Christie*, 8 Cl. & F. 214; and in order to show that the plaintiff having made a case of fraud, and having failed in establishing it, his bill ought to be wholly dismissed, he cited *Wilde v. Gibson*, 1 H. L. Cas. 605; *Archbold v. The Commissioners of Charitable Bequests*, 2 Ibid. 460; *Glascott v. Lang*, 2 Phil. 310, 322; and *Price v. Berrington*, 3 Mac. & Gor. 486; s. c. 7 Eng. Rep. 254.

[KNIGHT BRUCE, L. J. Surely, no one ventures to suggest that, if a plaintiff makes a case founded on fraud, and an alternative case not founded on fraud, his bill must be dismissed because he fails to prove fraud, though he succeeds in establishing the other case.]

Such was the result of the two decisions he had cited, pronounced by Lord Chancellors, and the two decisions he had referred to of the highest appellate tribunal in the country.

*Bacon*, in reply, urged that technical and not moral fraud had been

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charged; and that if the estate of Mr. Lipscombe were under any liability, so much as had been received by the partnership after the end of the term ought to be applied in its reduction, and the accounts, if any, taken on such footing.

During the argument, the court offered Mr. Currie's counsel the opportunity, if they thought fit, of having that gentleman examined as a witness, but they declined. Some of the appellants' arguments, not stated in this report, will be found referred to, and commented on by Lord Justice Knight Bruce.

*March 30.* KNIGHT BRUCE, L. J. A small country town in Hampshire, which—at least since the Reform Act—returned but one representative to the house of commons, happened to possess also but one bank, unluckily conducted upon opposition principles, that is to say, unfavorable to what, in the language of those who deal in members of parliament, is called, I believe, “the old influence.” This bank was supposed—whether regularly or irregularly—whether by means as to which

“più è tacer  
Che ragionar onesto,”

or otherwise—to disturb and endanger that influence so much, that the gentleman by whom the influence was, at or soon after the time of passing the act, impersonated, and an active and intelligent London solicitor, in his parliamentary, and no doubt in his general confidence, appear to have thought that an additional bank—a bank having more correct views of the public interest—might be beneficially set up in the borough; a plan which would, of course, relieve the free and independent inhabitants from the necessity of resorting for lawful accommodation to the existing establishment, and the plan was resolved on. But as neither of the gentlemen could or would be the resident manager, and it did seem necessary to have a sound man in that capacity, they looked about, and found a young farmer of the place, whose opinions upon the theory and practice of government were suitable, and to his great pleasure as well as surprise, no doubt, turned him into a banker and their partner; a choice additionally recommended by the fact that his wife was the niece and adopted daughter of an old agriculturist, well to pass in the world, who, being also a right-minded politician, might fill in the character of surety for the other rustic; and surety, accordingly, the senior agriculturist became, not once but twice; once in 1839, at the original launch of the bank, when consisting of the three, and again when, upon the retirement of the client or chief, it became composed of the solicitor and the younger farmer alone, which happened in 1842. The suretyship was effected by a bond, of course, with conditions, more or less apt, annexed. From the latter bond it is the object of this suit, instituted by the executor of the surety, to be relieved; for the earlier instrument is unimportant, except as matter of narrative and evidence. The latter and important one is this:

the bond is dated the 20th of August, 1842, and in the penalty of 10,000*l.*, the joint and several obligors being Mr. Lipscombe, the elder farmer, and Mr. Butterfield, the younger one; the obligee being the London solicitor, Mr. Currie.

The condition runs thus: "Whereas by articles of agreement indented, bearing even date with the above-written obligation, and made between the said James Currie of the one part, and the above Charles C. Butterfield of the other part, each of them, the said James Currie and Charles C. Butterfield, for himself, his heirs, executors and administrators, hath consented and agreed with the other of them, his executors and administrators, mutually and reciprocally, in manner therein mentioned, and hereinafter in part recited, that is to say, that the said James Currie and C. C. Butterfield shall be and continue partners together in the business of bankers for the full term of five years, to be computed from the day of the date of the now reciting indenture and of the above-written obligation; and that the said business shall be carried on under the firm of "Butterfield and Company," in the messuage or dwelling-house in which the same is now carried on, situate at Petersfield aforesaid, or at such other place or places as the said parties shall mutually agree upon for that purpose, to be carried on with such capital, to be advanced in such shares, and with such participations of profits, as in the said articles mentioned, and which said articles of agreement contain various covenants and clauses for regulating the conduct of the said partnership business and other matters relating thereto; and whereas the said J. Currie consented to become a partner in the said business at the instance and request of the said C. C. Butterfield and J. Lipscombe, and under an agreement on the part of the said C. C. Butterfield and of the said J. Lipscombe, as the surety of the said C. C. Butterfield, to indemnify the said J. Currie, his heirs, executors, and administrators in manner hereinafter expressed. Now, the condition of the above-written obligation is such that, if the said C. C. Butterfield and J. Lipscombe, or one of them, their or one of their heirs, executors, or administrators, do or shall, with or out of their or either of their, or any of their proper moneys from time to time and at all times hereafter keep harmless and indemnified the said J. Currie, his heirs, executors, and administrators, from and against all accounts, reckonings, claims, and demands, actions, suits, and other proceedings, and all sum and sums of money, costs, losses, damages, and expenses, to which he or they or any of them shall be subject or liable by reason or in consequence of any breach, non-observance, or non-performance by the said C. C. Butterfield, his executors or administrators, of all or any of the covenants, stipulations, and agreements expressed and contained in the said recited articles of agreement on the part of the said C. C. Butterfield, his executors or administrators, to be observed or performed; or by reason or in consequence of the bankruptcy or insolvency of any of the correspondents, customers, or debtors of the said partnership, the infidelity, default, or neglect of any of the clerks, agents, or servants of the said partnership; or by reason or in consequence of any act, matter, or thing in

any way relating thereto respectively, or any other matter or thing whatsoever, in anywise relating to the said partnership or to the concerns thereof, and arising without the act or default of the said James Currie,—then the bond to be void.

This instrument having been put in suit by Mr. Currie, the present bill seeks not only the proper accounts to ascertain the amount of liability, if any, but also absolute and unconditional relief from the instrument on more than one alleged ground of objection. The most, if not the only, important question in the cause, however, is whether upon or after the termination by lapse of time on the 19th or 20th of August, 1847, of the partnership constituted in 1842, to which the bond in dispute or its condition relates, the plaintiff's testator, Mr. Lipscombe, became equitably discharged from the bond—discharged, I mean, by conduct on the part of the defendant, Mr. Currie, subsequent to July, 1847, independently of pecuniary satisfaction; that is to say, whether there was pecuniary satisfaction or not? This is a question as to which it must be borne in mind that the fact that Mr. Lipscombe became an obligor in the bond in the character of surety for Mr. Butterfield was necessarily known contemporaneously to Mr. Currie, the obligee, whose duty accordingly, in the events that happened, it became, as between him and Mr. Lipscombe, to proceed in a particular manner after the 19th or 20th of August, 1847,—whose duty, I say, if intending to make, after the 20th of August, any demand upon Mr. Lipscombe under the bond,—under which, in fact, no demand was on that day or had previously been or was afterwards made before the bankruptcy of Mr. Butterfield, nor, indeed, does it appear that at any time after Mr. Lipscombe's execution of it, any notification or communication respecting it was in any sense or manner made to him or his executors before that bankruptcy—it was in such particular manner to proceed. In what particular manner, however, was it thus the duty of Mr. Currie to proceed? I apprehend that he was bound not to embark or join in embarking the joint estate of the firm as it stood in 1847 at the end of the partnership formed in 1842, in any new partnership or adventure, but to cause it to be, with all reasonable dispatch, collected, realized, and applied in discharging the debts and liabilities of the firm as they stood on the 20th of August, 1847, so far as necessary for that purpose. I say so, because the 16th and 17th clauses of the articles of 1842 were to be acted upon. This course, however, was not taken; but instead, Mr. Currie agreed with Mr. Butterfield to renew or continue, and they did accordingly renew and continue their partnership as from the end of the term of five years, which expired, as I have said, on the 19th or 20th of August, 1847, and from that time accordingly their business of bankers was continued under the same style and in the same manner as before, until they finally dissolved their connection in business on the 3d of April, 1849, from which time until the bankruptcy of Mr. Butterfield, in July of the same year, he continued to carry on the business on his sole account. Now, at the termination by lapse of time in August, 1847, of the partnership formed in 1842, it is quite clear there was joint estate of that partnership. I

mean joint estate of a substantial amount and value, comprising, and perhaps chiefly consisting of debts of a considerable amount then due to it. This joint estate was at that time, of course, in the possession of the two parties, subject only to the necessary qualification of the word "possession" when applied to debts. Whether the partnership was then solvent or not solvent, whether Mr. Butterfield was solvent or not solvent, it must be considered that Mr. Currie was then at least solvent, nor probably has he ever been otherwise; but if the partnership at that time was insolvent, it was not so avowedly, apparently, or visibly.

There is not the least reason to believe that in the year 1842, or at any time between that year and the dissolution in April, 1849, the partnership for the time being professed or represented itself to be, or was considered by the world insolvent; nor, in truth, upon the face of their books and accounts was the partnership formed in 1842, otherwise than solvent at its termination in 1847. If in any sense or for any purpose it was, in truth, then insolvent, it was, I apprehend, only so in respect and by reason that some of the debts then due to it, whether then recoverable or not, have not been recovered. In this state of things, by means of the arrangement already mentioned of 1847, all the joint estate of the partnership formed in 1842, which existed at its termination in 1847, passed into and became the property of the renewed partnership formed or commenced in August, 1847, and was dealt with accordingly; the business, I repeat, having been carried on until the early part of April, 1849. It is said that this was only for the purpose of winding up the partnership formed in 1842; but, although I do not mean to impute insincerity to any person who has so asserted, I must say my opinion of the case is not so. The banking business appears on the evidence to have been carried on from the 19th or 20th of August, 1847, until the final dissolution in 1849, just as it had been in the previous part of 1847, and earlier. All this, in my opinion, was unjustifiable as against Mr. Lipscombe, unless upon the hypothesis of his liability under the bond having ceased. But it is said that Mr. Lipscombe, who lived hard by, knew of the banking business being continued by Mr. Currie and Mr. Butterfield after the 20th of August, 1847, and did not object to it. That may be, or is so. It does not, however, appear that he was aware of the terms, plan, or principles on which they were proceeding. He had no right to object to their being bankers in partnership together after that day, and might well have supposed that Mr. Currie was either acting regularly or rightly, or had no intention of making a claim against him upon the bond, and, indeed, as I have said, no claim was, in fact, made before July, 1849, although his death happened in October, 1848. Mr. Currie, I think, by thus acting, discharged Mr. Lipscombe in equity from the bond. But, assuming that at the time of his decease he was not discharged, still, I do not see how Mr. Currie's course of acting in April, 1849, can be justified against the executor, for neither was the 16th or 17th clause of the articles acted upon or attended to, and the joint estate, at that time not inconsiderable, was left to the disposition or management of Mr.

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Butterfield, who continued the business in every sense alone. It has been argued for Mr. Currie, that the defence arising from his conduct after July, 1847, is available to the executor at law if founded in truth and justice; but if I were sure of this, which I am not, I should still hold that there is a jurisdiction here fit, under the circumstances of this case, to be exercised by us. It has also been contended that the question of the discharge of Mr. Lipscombe by reason of Mr. Currie's conduct after July, 1847, independently of payment, has not been raised by the bill, and is not cognizable in this suit. That contention, however, I consider unfounded. But as it was possible that the scope of the bill might have been misapprehended, we thought it right, during the hearing, to offer Mr. Currie the opportunity of adducing further evidence, including an oral examination of himself before us, of which opportunity his counsel declined to avail themselves, as believing, no doubt, that all evidence in support of his case, capable of being usefully resorted to, was already before the court. I wish to add, that, although all that I have hitherto said has been upon the supposition of the plaintiff's failure and inability to establish a case of satisfaction of the bond by actual payment, I am very far, indeed, from being persuaded of that failure and of that inability; on the contrary, my impression from the materials before the court, although I do not bind myself upon the point, is, that the amount of the sums received after the 20th of August, 1847, by Messrs. Currie and Butterfield, in their capacity of copartners, in the respective copartnerships of 1842 and 1847, which, as between them and Lipscombe and his estate, were, at least in equity, of right applicable, and ought, at least in equity, to have been applied by Messrs. Currie and Butterfield in paying off and discharging the liabilities, if any, of Mr. Lipscombe and his estate under the bond, was sufficient to pay off and discharge that liability, if liability there was. All that I have said has been also upon the supposition against the plaintiff that he has not proved enough to show that Mr. Lipscombe was not, in July, 1847, equitably, as well as legally, bound by the terms of the condition annexed to the bond in dispute, according to the actual tenor of that condition. Our opinion to this effect was, indeed, expressed by my learned brother as well as by myself, before hearing Mr. Currie's counsel: it is not necessary to say whether subsequent reading and consideration have, so far as relates to myself, strengthened or otherwise affected that impression; for whether it was right or wrong, correct or incorrect, the litigation, as I conceive, ought and must be, in all respects, decided in the same way. Mr. Currie, in June, 1849, sent to Mr. Butterfield a lawyer's bill amounting to 33*l.* and a fraction, a bill chiefly and solely for the preparation of the bond and articles of 1842. It was accompanied by a letter to him from Mr. Currie, dated the 16th of June, 1849, which was in these terms:—

“Lincoln's Inn Fields, June 16, 1849.

“Dear Butterfield: In looking over our accounts I see we have a demand upon your bank, and I send you a copy of it. Will you settle it? I shall be glad to know how you have got on since our

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appearance in *The Gazette*, and we ought to exchange letters of mutual release.

"Yours, faithfully,

"JAMES CURRIE."

My conclusion upon the whole matter is, that Mr. Currie in writing this letter, and making, as he did, no demand under the bond before the bankruptcy of July, 1849, took a more accurate view of his position than when he brought the action which produced this suit, and that the injunction against that action must be made perpetual, and the bond delivered up to the plaintiff to be cancelled,<sup>1</sup> he neither receiving nor paying any costs of any part of the litigation from the beginning; but if he has made a deposit, taking it back.

TURNER, L. J. This case, though peculiar in its circumstances, does not appear to me to be open to any very serious doubt, either as to the facts on which it depends, or as to the law to be applied to those facts. In the year 1833, Hylton Joliffe and the defendants, Currie, and Charles Calton Butterfield, established a bank at Petersfield. They entered into articles of partnership on the formation of the bank, and carried on the business under those articles and other articles entered into in the year 1839 down to the 20th of August, 1842. Butterfield was the managing partner of the bank, and, upon the formation of the partnership, a bond was given by him and by John Lipscombe, as his surety, to indemnify the other partners against any misconduct on his part. The decision we have already pronounced, renders it unnecessary to examine the terms of this bond or of the articles of partnership which I have mentioned. On the 20th of August, 1842, the partnership of Joliffe, Currie, and Butterfield was dissolved, and a new partnership was formed between Currie and Butterfield. New articles of partnership were entered into between these two parties. They were dated the 20th of August, 1842, were made between Currie, of the one part, and Butterfield, of the other, and contained, among other provisions which I do not think necessary, in the view I take of this case, to mention, two clauses, which are the 16th and 17th clauses, in these terms. [They were read at length by his lordship.] Those are the only provisions in the articles to which I think it necessary, in the view I have taken of this case, to refer. Upon the formation of this new partnership a joint and several bond, of even date with the articles, was also given by Butterfield, and Lipscombe as his surety, to Currie. My learned brother has already read that bond, and, therefore, I do not observe upon it further. It was a general bond conditional to indemnify Currie against all losses whatever in respect of the partnership, and it recited the articles of partnership, and that its intended duration was the term of five years. The partnership between Currie and Butterfield expired by effluxion of time on the 20th of August, 1847. The business of the bank was not then wound up, but was carried on (whether for the

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<sup>1</sup> See this qualified at the end of the case.

purpose of winding up is one of the questions in the cause) up to the 3d of April, 1849, when it was dissolved by notice in *The Gazette*.

It does not appear that any arrangement as to the assets, or debts of the firm was made between Currie and Lipscombe on the occasion of this dissolution. The business, however, was not then wound up; it was carried on by Butterfield alone until some time in the month of July, 1849, when he absconded and became bankrupt. In the mean time Lipscombe had died. He died in the month of October, 1849, and the plaintiff in this case is his executor. After Butterfield had absconded, demands were made upon Currie, in respect of debts or liabilities of the partnership of Currie and Butterfield, which were contracted or subsisting during the continuance of that partnership from August 1842 to 1847. He satisfied those demands, and brought an action at law on the bond of indemnity against the executor of Lipscombe, who is the plaintiff in this suit. The plaintiff, thereupon, filed this bill to have the bond delivered up to be cancelled, and for an injunction to restrain the proceedings at law, insisting partly that Lipscombe was improperly induced by Currie to enter into the bond, and partly that Lipscombe and his estate have been discharged from all liability upon the bond by the conduct and dealings of Currie. The case was argued before the Vice-Chancellor mainly on the first of these grounds, and his Honor dismissed the bill, being of opinion that the plaintiff was not entitled to relief upon that ground. We have already stated that we concur in the opinion of the Vice-Chancellor, that the plaintiff has not established this part of his case. The question which we reserved for judgment, and which we have now to determine, is, whether Lipscombe and his estate have been discharged from liability upon this bond by the conduct and dealings of Currie. In determining questions as to the continuing liabilities of sureties, the first point to be considered, as I apprehend, must be, what were the relative rights and obligations of the party for whose benefit the contract for suretyship was entered into; for sureties, when they contract their liabilities, must necessarily look to those rights and obligations. They lie at the root of, and form the inducement and foundation of, the contract. When a man becomes surety for the debt of another, he looks to the power of the creditor to enforce payment from the debtor, and to the obligation upon the debtor to pay, and so in other cases. We must consider, therefore, in the first place, what were the rights and obligations of Currie and Butterfield under the articles of partnership between them. It is not material for the present purpose, what the rights and obligations were during the continuance of the partnership, but it is most important to see how they stood at its expiration. This partnership was for a limited period of five years. The articles are silent as to what was to be done at the expiration of the five years, except so far as the sixteenth or seventeenth clauses extend; and it was argued, and I think justly, that those clauses do not reach beyond the case of one party desiring to retire from, and the other to continue the business. But, assuming it to be so, does it not follow that the law steps in, and supplies the contract, and that the concern

was to be wound up? I apprehend that it does. It was said, however, that these sixteenth and seventeenth clauses, by providing for what was to be done if either desired to retire, show by implication that the business was to continue if either party so desired, and that Lipscombe having been cognizant of the articles, must be bound by the inference thus to be deduced from them. But this argument goes much too far; the utmost extent to which it can reasonably be carried, seems to me to be that the articles left the parties at liberty, as indeed they must in any event have been, to agree that the business should be carried on. In the absence of such an agreement, my clear opinion is, that this business ought to have been wound up at the expiration of the time limited by the articles for the duration of the partnership. Assuming, then, that the partnership between Currie and Butterfield ought, in the absence of agreement between them, to have been wound up at the expiration of the term limited by the articles, we have next to consider whether it was competent to Currie to agree to its continuance without the consent of Lipscombe, and yet to hold Lipscombe liable upon the bond. I am of opinion that it was not. The position of principal and surety I take to be this; the surety has the right to satisfy the obligation by which he is bound, and upon satisfying it to stand in the place of the party to whom he is bound, against the party for whose benefit he has incurred the obligation. Upon the expiration of this partnership, therefore, Lipscombe had the right, if he thought fit to do so, to satisfy the debts and liabilities of the partnership, and, upon satisfying them, to stand in Currie's place as to the winding up of the business. Upon Currie being satisfied, his rights in the assets of the partnership would become the rights of Lipscombe. It would be for Lipscombe, and not for Currie, to judge, in conjunction with Butterfield, how the assets of the partnership should be dealt with, and the debts due to it got in; what debtors should be sued; with which of them arrangements should be made; in what order and course the debts and liabilities of the partnership should be satisfied. Was it then competent for Currie, consistently with the existence of this right in Lipscombe, to agree with Butterfield, without the consent of Lipscombe, that this business should be carried on? I am of opinion that it was not. The effect of such an agreement must necessarily be to alter the state both of the assets and liabilities of the partnership as they stood at the dissolution, and by so doing to alter the position of Lipscombe; and this, in my opinion, it was not competent for Currie to do, and at the same time to hold Lipscombe to his liability upon the bond. It was attempted to meet this view of the case by alleging that the partnership was continued only for the purpose of being wound up. Whether the right of Currie against Lipscombe upon the bond would have been removed if this had been really the case, is a point upon which I give no opinion whatever. It does not appear to me that the facts of this case warrant that question being raised, for I see no trace whatever of any steps having been taken to wind up this partnership; on the contrary, I am satisfied that the business was carried on after the expiration of the partnership, just in the same manner as it had been carried on

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during its continuance, and without any attempt to wind it up in the proper sense attaching to that expression. That it may have been in the course of winding up in this sense, that the moneys received from the customers were placed to their account, and so operated to discharge the debts which were due from them, is possible, and this, I presume, is what is meant by Mr. Currie's answer; but this was clearly not such a winding up as he, or Lipscombe, standing in his place, had the right to insist on. Even supposing, however, that it was, the partnership was not finally wound up at the period when the dissolution took place in April, 1849, and yet upon that dissolution all the assets of the partnership were permitted by Currie to pass into the hands of Butterfield, and the business was continued by him as before; how can this be justified as against Lipscombe the surety? It is said, however, that Lipscombe acquiesced; but acquiescence imports knowledge, and there is nothing to show that Lipscombe did at all know the terms on which the business was carried on. I am, therefore, of opinion that the plaintiff is entitled to be relieved from this bond, and that the decree must be altered by directing the bond to be delivered up to be cancelled, and awarding a perpetual injunction to restrain proceedings upon it. I think that the deposit should be returned, and that there should be no costs of any part of the suit, either on the one side or the other. Both Currie and Lipscombe were engaged in a transaction which neither of them ought to have entered upon, and which no court of justice can countenance; and the plaintiff has failed as to part of the case which he has brought forward.

Their lordships directed, (on the suggestion that as Lipscombe and Butterfield were jointly and severally liable on the bond, it ought not to be cancelled,) that the bond should be deposited with the registrar, and that a perpetual injunction, restraining the putting it in suit against the representative of Lipscombe, should issue.

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STONE v. GODFREY.

March 6 and 16, 1854.

*Bar to suit by Lapse of Time — Parent and Child — Trustee and Cestui que Trust — Contract of Marriage on Faith of Representations — Relief against Mistakes of Law — Title to Beneficial Possession not to be set up by Possession as Trustee.*

A father claiming to be tenant by the curtesy of land belonging in equity to his deceased wife, filed a bill in 1826, as next friend of his daughter for partition. In 1830, a decree was made and partition ordered, and in 1833, the court directed the daughter's share to be conveyed to the father for a term until she came of age, upon trust to pay the rents for her maintenance, and the conveyance was so made. Before that bill was filed, the father was advised that he had no claim as tenant by the curtesy, and on the conveyance he was advised by other counsel, that he had, though this opinion was afterwards retracted. The

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first and second opinions were communicated to him. He performed the trusts until the daughter came of age, and after that time he accounted for the rents to her. In 1847, she married, and on her and her husband bringing ejectment against the father in 1852, he filed a bill claiming to be tenant by the curtesy, but the claim was dismissed by one of the Vice-Chancellors, and he appealed from the decree:—

*Held*, that the plaintiff having entered as trustee for his daughter, had held the land as trustee after she attained twenty-one, and could not set up that possession as his own; that the lapse of time between the decree of 1830, and the filing of the bill in 1852, was a bar; that the daughter having married on the faith of the father's representation that the estate was hers, he could not disturb her title, for although the court will relieve against mistake in law, yet here the father three years after the decree had his attention brought to the state of his own title, and still continued to treat the title of the daughter as paramount to his own.

THIS was an appeal from a decree of Vice-Chancellor Stuart, (23 Eng. Rep. 633,) dismissing the plaintiff's bill. John Watterer, by his will, dated the 5th of April, 1799, devised his residuary freehold and copyhold estates to James Steadman and John Kemp, their heirs and assigns, upon trust to make certain payments, and subject thereto, to pay the rents to his brothers and sisters, James, Jesse, Elizabeth, and Jane, in equal proportions during their natural lives, as tenants in common, and after their several decease, then "to each and every their several issue and issues absolutely forever." The testator died in May following, seised of both freehold and copyhold estates, leaving James Watterer his heir at law and customary heir. By reason of the death of Jesse Watterer, intestate and without issue, in November, 1819, his eldest brother succeeded to his share as heir at law and customary heir; and by reason of the death of James Watterer, in March, 1822, his daughter Mary, as his heiress at law and customary heiress, became equitably entitled to two undivided fourth parts of the testator's residuary estate. Mary Watterer married Jabez Stone in July, 1821, and died in 1824, leaving issue one child only, Elizabeth Stone. When James Watterer, the eldest son of the testator, died, the trustees of the will paid the whole of the rents to the testator's daughters, Elizabeth Chitty and her husband, and Jane Blake and her husband. The surviving trustee of the will, John Kemp, declined to admit the title of Elizabeth Stone, an infant of about two years of age, to the two undivided moieties. The advice of counsel was taken as to the propriety of filing a bill, and on that occasion a question arose whether or not Mr. Jabez Stone was entitled to a life-estate in two fourths as tenant by the curtesy by reason of the title of his late wife. The counsel employed to draw the bill, the late Master Duckworth, then at the bar, gave an opinion adverse to Mr. Stone's claim, and advised him that if he persisted in the claim he could not act in the suit as his daughter's next friend. This opinion is set forth at length in the judgment of Lord Justice Turner.

The bill in *Stone v. Kemp* was filed on the 1st of November, 1826, by Elizabeth Stone, an infant, by Jabez Stone, her father and next friend, against John Kemp, the surviving trustee of Mr. Watterer's will, George Chitty and Elizabeth, his wife, George Chitty, the younger, and William Blake and Jane, his wife; which after setting

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forth the foregoing facts and making certain charges as to the application of the rents, prayed that the trustee, John Kemp, might be decreed to pay two fourth shares of the rents and profits to Elizabeth Stone and that a partition might be made of the real estate. On the 3d of February, 1830, a decree was made, declaring that Elizabeth Stone had been entitled from the death of her mother to two fourth parts of the estate in fee-simple and the rents and profits thereof, and it was ordered that a commission of partition should issue to divide the estate into four equal parts, and that two of such parts should be allotted to Elizabeth Stone, and that proper conveyances should be made. The commission was executed, and the commissioner's certificate, dated the 6th of April, 1832, was confirmed by an order of the court, dated the 11th of May following. On the 23d of February, 1833, a petition was presented by Elizabeth Stone, by her father and next friend, praying that a sufficient part of the rents and profits of her estate might be allowed to him for her maintenance, and by an order, dated the 5th of March, following, made on further directions and on the petition, it was ordered that John Kemp should execute proper conveyances of the two fourth shares of the estate, such conveyances, to be settled by the Master, and that the rents and profits should be received by Jabez Stone, and be by him applied for the maintenance, education, and clothing of his daughter Elizabeth Stone, during her minority, or until further order. Accordingly indentures of lease and release, approved of by the Master, dated the 30th and 31st of October, 1833, were drawn, the release being made between John Kemp of the first part, Jabez Stone of the second part, and Elizabeth Stone of the third part, whereby the lands allotted in severalty to her were conveyed and assured to the use of Jabez Stone, his executors, administrators, and assigns, for ten years from the day before the date of the indenture of release, if Elizabeth Stone should so long live and remain an infant and unmarried, and from and after the expiration of the said term, and subject to the trusts thereof, to the use of Elizabeth Stone, her heirs and assigns forever, with a declaration that Jabez Stone should stand possessed of the estate during the term of ten years, upon trust to receive the rents and apply them for the maintenance and support of Elizabeth Stone.

The circumstances which led to the present suit were these: Jabez Stone entered into the receipt of the rents under the deeds of 1833. Elizabeth Stone, his daughter, attained her age of twenty-one years in 1843, but he still remained in receipt of the rents. In 1847, she intermarried with Mr. William Godfrey. In 1852, Mr. and Mrs. Godfrey brought an action of ejectment against Mr. Stone for the recovery of possession of the estate; whereupon, on the 4th of March in that year, he filed the present bill against his daughter and her husband, which, after certain allegations besides those contained in the foregoing statement, and among them an allegation that the plaintiff was, during the whole progress of the suit of *Stone v. Kemp*, ignorant of his title, and that that suit was conducted under his direction as next friend of Elizabeth Stone, by the advice of his solici-

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tors, until 1833, when Mr. Senior, by a written opinion given on or about the 19th of June in that year, expressed it to be his view that the late Mary Stone, the plaintiff's wife, was the person seised in fee, and consequently that the plaintiff, Jabez Stone, ought to have been considered tenant by the curtesy. (The bill, by subsequent amendments, alleged that Mr. Senior afterwards withdrew this opinion, and concurred in the opinion of Mr. Duckworth, who had drawn the bill in *Stone v. Kemp*.) The bill prayed an injunction to restrain the action of ejectment, and prayed that the plaintiff, not seeking to disturb the partition made in the aforesaid suit, or any account of the rents and profits of the said estates prior to the partition thereof, might be declared by the decree of the court to have been entitled to the estate by the curtesy in all the lands and hereditaments comprised in and conveyed by the indentures of lease and release of the 30th and 31st days of October, 1833, and allotted to Elizabeth Godfrey, then Elizabeth Stone, in severalty; and that it might be declared that the estate acquired by Elizabeth Godfrey by that conveyance to her was subject in equity to the said estate or interest of the plaintiff, such conveyance and the direction for the same having been made under a mistake; and that the defendants might be decreed to convey the lands and hereditaments allotted and conveyed to Elizabeth Godfrey to the plaintiff for his life, or that he might be otherwise quieted in the possession or enjoyment thereof against the defendants or any person claiming under them: and that, if necessary, or the court should think fit, the decree made on the 3d of February, 1830, might be declared to be erroneous, so far as it declared that Elizabeth Godfrey had been entitled, from the death of her mother, to two fourth parts of the devised estates in fee-simple, and to the rents and profits thereof; and that the court might, if necessary, or if it should think fit, now alter and vary that decree, and declare that the plaintiff, upon the death of his wife, became and was still entitled to an estate for his life as tenant by the curtesy in the said two fourth parts; and that Elizabeth Godfrey was entitled thereto in fee-simple, subject to such estate in the plaintiff.

The case was heard before Vice-Chancellor Stuart, who dismissed the bill, without costs, being of opinion that, as Jabez Stone had deliberately acted as next friend in the original suit after having been advised that to do so, if he persisted in his demand as tenant by the curtesy, was improper, for the title of the daughter was adverse to that claim, and as Jabez Stone had derived benefit from the proceedings in that suit, he was not entitled to any relief, all that he had before done being totally opposed to his present claim.

From this decree the plaintiff appealed.

Some material passages in the answer will be found in the judgment of Lord Justice Knight Bruce, and an essential part of the defendants' evidence is set forth in that of Lord Justice Turner.

The case was argued at very great length both on the questions of law, whether the plaintiff was or was not entitled to an estate by the curtesy, and whether he was or was not entitled to relief on the ground of mistake; and also on the question whether his right, if

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any, was, under the circumstances of the case, barred by lapse of time. As the judgment of the court is founded on the latter point, and as the question of law as to curtesy was not decided, the arguments, *in extenso*, on that question are omitted.

*Lee* and *Fooks* appeared in support of the appeal, contending that the plaintiff was entitled to the estate by the curtesy, on the ground that his wife was equitably seised of the two fourths of the estate, although the trustee made no payments to her, and cited the following cases: *Casborne v. Scarfe*, 1 Atk. 603; *Roberts v. Dixwell*, Ibid. 607; *De Grey v. Richardson*, 3 Ibid. 469; *Sweetapple v. Bindon*, 2 Vern. 536; *Lord Grenville v. Blyth*, 16 Ves. 224; *Morgan v. Morgan*, 5 Madd. 408; *Parker v. Carter*, 4 Hare, 400; Co. Litt. 29, a. They argued that the plaintiff, having acted in mistake of law as to his rights, his instituting and prosecuting the suit of *Stone v. Kemp*, as next friend of his daughter, was not a bar to his title to relief in the present suit, — relying on these cases and authorities: *Gee v. Spencer*, 1 Vern. 32; *Bingham v. Bingham*, 1 Ves. sen. 126; *Cocking v. Pratt*, Ibid. 400; *Pooley v. Ray*, 1 P. Wms. 355; *Evans v. Llewellyn*, 2 Bro. C. C. 150; *Turner v. Turner*, 2 Chanc. Rep. 81; *Tucker v. Searle*, Ibid. 91; *The Marquis Townshend v. Stangroom*, 6 Ves. 328; *Fonblanque on Equity*, 5th ed. 116. As an authority for the frame of the suit they cited *Mitford on Pleading*, 5th ed. 112.

*Glasse* and *Morris*, for the respondents, on the point of curtesy, argued that, as there was an equitable possession adverse to the plaintiff's wife during her life, there was no equitable seisin whereto the title by curtesy could attach, and cited *Hearle v. Greenbank*, 3 Atk. 695, and *Cholmondeley v. Clinton*, 4 Bligh, 1; that as the opinions of counsel were communicated to the plaintiff he could be under no mistake on the title, and therefore was not entitled to relief; and, lastly, that his acquiescence in the cause of *Stone v. Kemp*, from 1826 to the period of the commencement of the action of ejectment, was a sufficient bar to the present suit; for which they cited *Smith v. Clay*, Ambl. 645, and *Earl of Deloraine v. Brown*, 3 Bro. C. C. 633.

*Lee* was heard in reply.

*March 16.* KNIGHT BRUCE, L. J. This suit, commenced in the year 1852, had and has for its sole object the establishment of an alleged title of Mr. Jabez Stone, the only plaintiff, to an equitable life interest in some lands in Surrey, of which, seemingly, the annual value is between 20*l.* and 40*l.* This he claims as tenant by the curtesy, having survived his wife, the mother, by him, of the defendant, Mrs. Godfrey, whom I collect to be his only child. The other of the two defendants is her husband, who became so in the year 1847, when she was between twenty-four and twenty-six years of age, her birth having been in the year 1822, and the defendants appear to be, in right of the lady as tenant in fee-simple or tenant in tail, entitled legally as well as equitably to the lands, either free from any other

title or claim, or subject only to the demand of Mr. Stone made, as I have said, in the present suit; a demand, however, which is absolutely at variance and inconsistent with a decree of the court, made at the rolls in the year 1830, in a cause in which Mrs. Godfrey, then a child under nine years of age, was the plaintiff and John Kemp and others were defendants. If Mr. Stone is or was tenant by the curtesy, or entitled to be so, not only was the rolls decree erroneous as excluding in Mrs. Godfrey's favor that alleged right, but the suit itself, in which the decree was made (a suit for a partition among other purposes) was defectively and wrongly constructed; for Mr. Stone was not a party to it, though his alleged title, if it ever existed and was of any force or validity, existed and was of equal force and validity not only before and when the decree was made, but before and when the bill on which it was pronounced was filed. Now it appears, from what I have said, that the decree preceded by more than twenty years the commencement of the present suit. When was Mr. Stone, however, first aware of the decree? The answer must be, that he was so as soon as it was made. He, in fact, asked for and obtained it as the next friend of his daughter, which character he filled in the cause, and throughout the cause, during her minority. So that if it be assumed, as upon the hypothesis of our knowing the whole truth I do assume, that if Mr. Stone, at any time between the minority and the marriage of his daughter, had filed a bill against her for the purpose of obtaining substantially the same relief as he is now asking, and upon the same ground, he would have been entitled to succeed in his suit, I must, to say the least, represent myself as not by any means satisfied that now he is not barred by the lapse of time between the year 1830 and the year 1852, and this whether laying or not laying stress on that order of the 5th of March, and the conveyance of the same year—two documents, however, of which neither can be disregarded. By the conveyance under which the legal fee in the land is now vested in Mrs. Godfrey, the term of years in possession was limited to the plaintiff, as a trustee for her. The term ended with her minority, but the conveyance was not executed by him. Still it had, in 1833, the sanction and approval of a Master in Chancery, and equally must be taken to have had, in the same year, Mr. Stone's sanction, acceptance, and approval also. Nor can he be deemed to have been, when his daughter obtained her majority, in receipt of the rents of the lands adversely to the decree of 1830, or to that conveyance. It seems to me, indeed, that, having accepted a trusteeship in possession under it, he became and is disabled from saying, for his own benefit or in his own defence, that he has been in the receipt of the rents adversely to her at any time since the decree of 1830, or adversely to her husband at any time since her marriage. My impression, I repeat, is, that, as against the present plaintiff, it must be considered that such possession, as at any time since 1830, he has had of the lands in dispute, has been a possession upon the account and on behalf of his daughter, till her marriage, and of her husband since. But there is more. The evidence in the cause that we are now deciding divides itself into three parts:

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first, documents admitted, and therefore undisputed; secondly, proof of facts not denied or disputed; thirdly, proof against and in support of the truth of alleged facts asserted upon one side and denied upon the other. Now, had the third division been absent, so as to reduce the evidence before us to the two others, I should have considered it a proper inference from them, and a just conclusion to hold, that before the defendants' present marriage, one or both of them had been, by the acts and conduct of the present plaintiff, induced to suppose and believe the lands in question to have become the estate of the defendant, his daughter, in possession by right upon her majority, if not at an earlier period, and to have continued to belong to her rightfully in possession down to the time of her marriage, and that at that period the defendants married on the faith and on the understanding of the true state of her rights being so, and that, therefore, it was impossible for the plaintiff after the marriage to institute successfully, such a suit as the present against them. Upon the hypothesis, consequently, that I have been stating, I should have thought it right to dismiss the bill, and this on principles and on authorities, of which, if not all, some of considerable weight are mentioned, in the judgment pronounced by the Master of the Rolls in the recent case of *Money v. Jorden*, 15 Beav. 372; s. c. 11 Eng. Rep. 182; on appeal, 2 De Gex, M. & G. 318; s. c. 13 Eng. Rep. 245; in which case he held, as I hold here, this ground of defence sufficiently put in issue by the passages of the defendants' answer that I shall now read: "And the defendant, Elizabeth Godfrey, says, and this other defendant says he believes, that the said plaintiff, during such time as the defendant, Elizabeth Godfrey, lived with him, and, in fact, up to her marriage in the year 1847, always in each half-year verbally accounted with the defendant, Elizabeth Godfrey, for the rents and profits received by him in respect of the said real estate; and that the said plaintiff was in the habit of taking or charging 5s. per week for the board and lodging of the defendant, Elizabeth Godfrey, and handing over to her, from time to time, what he, the said plaintiff, stated to be the difference between that sum and the amount of the rents and profits which he had received for or in respect of the said estate; and that the yearly balance so handed over by the said plaintiff, as aforesaid, generally amounted to between 8*l.* and 10*l.*, out of which the defendant, Elizabeth Godfrey, used to provide herself with clothes. The defendant, Elizabeth Godfrey says, and this other defendant says he believes, that no written accounts were ever given by the said plaintiff to the defendant, Elizabeth Godfrey, but the said plaintiff informed the defendant, Elizabeth Godfrey, or gave her to understand, the moneys from time to time paid to her by him, were the balance of the rents and profits of the said lands and hereditaments; and that up to the time of the marriage of these defendants, the said plaintiff always told the defendant, Elizabeth Godfrey, and admitted, that the said lands and hereditaments were the property of Elizabeth Godfrey, and never made any claim of right to them on his part. They say that the said plaintiff has also, subsequently to

the marriage of these defendants, spoken to each of these defendants of the said estate as being the property of the defendant, Elizabeth Godfrey, and said that he would not wrong the defendant, Elizabeth Godfrey, of one farthing."

The question, or the next question, then is, whether so much of the evidence as it stands as is favorable to the defendant on the point of the faith, the belief, under which they married, and the plaintiff's liability to have that faith, that belief, treated as the legitimate consequence of his acts and conduct, is overbalanced by the residue? and I am of opinion that it is not. The division of it which I have called the third, appears to me, on consideration and on a just estimate of its several parts, rather to support and strengthen than to weaken the inference which, as I have said, I should have drawn from the other two alone. Mr. Stone alleges, and probably with truth, that Mrs. Godfrey's marriage was without his sanction, against his wish, and effected clandestinely. But she had been ten years marriageable. He had not acted on the venerable precept: "Marry thy daughter, and so shalt thou have performed a weighty matter;" and I suppose that in an artisan's family, not less than in others, a maiden of twenty-five may not unreasonably consider that she has been single long enough. Now, in the house of the widower, Mr. Stone, was living, not only the father and daughter, but also a bachelor, Mr. Godfrey, who seems to have made himself intelligible to the young lady, and whom viewing with approbation, she may well have said to herself: "It is time that I should be married. I am of a steady age. I know that I have a fortune, because my father has told me so, but he manages and seems pleased with managing it: will he approve of giving it up? May he not consider a son-in-law likely to interfere, and be troublesome? Under all the circumstances, I think I had better marry Mr. Godfrey, and tell my father afterwards." This was natural enough, and it was equally natural that when the father, after her marriage, denied her right to the property, and claimed it, should say to him: "You made me believe it was mine; I should not have married without the means of beginning the world. I have taken an irrevocable step in reliance on the truth of your assertion, and that must be irrevocable too." Finally, this suit appears to me to be ill-founded. My learned brother also thinks as I do, that it would not have been right not to dismiss the bill. The bill was dismissed, and we both consider that the appellant must pay the costs of the appeal.

There is, however, a slight difference of opinion between us, as to the nature otherwise of the order proper now to be made; and in that state of things the view of each of us is, that our order should be one merely dismissing the appeal, with costs; and so it will be.

TURNER, L. J. The plaintiff in this case, in effect, asks of the court to raise a trust for his benefit on the legal estate vested in the defendants, and he asks this relief upon the footing of an equitable title which accrued to him in the year 1824. The ground on which he founds his title to the relief is, that in the year 1826 he was erro-

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neously advised that his equitable title could not be maintained; and I assume that the advice so given to him was erroneous, and that this court has power, as I feel no doubt it has, to relieve against mistakes in law as well as against mistakes in fact. When, however, parties come to this court to be relieved against the consequences of mistakes in law, it is, I think, the duty of the court to be satisfied that the conduct of the parties has been determined by those mistakes, otherwise great injustice may be done. Parties may be erroneously advised as to the law, but they may be told on what circumstances the question of law depends, and in what mode it may be tried, and they may determine (whether the advice which they have received be well or ill founded) whether they will give up the question in favor of the party with whom it arises. Cases of this nature, therefore, require most careful examination, and particularly when they arise between parent and child. These considerations have led me to look very carefully into the facts of the case; and, upon examining them, I am satisfied that this plaintiff, having been made aware of the question on which his title depended, determined to waive it in favor of the defendant, his child.

In the first place, the opinion upon which he acted in the year 1826, is in these terms: "I am of opinion that Mr. Stone has no rights or interests under the will of 1799. He might have been tenant by the curtesy of his late wife's share if she had been seised thereof, but she was never in possession or receipt of rent absolutely or constructively, for her title to the premises was always and is still denied and treated as a nullity by them in possession. If, however, Mr. Stone thinks fit to claim the curtesy, either on the ground of the possession of the tenants or of the trustee, being the possession of his late wife, it is clear such claim will be adverse to that of his daughter, and that they cannot sue together." So that opinion, although it advises him he has not the estate by the curtesy, tells him the question on which that depends, that it depends on the ground whether the possession of the tenants or of the trustee is to be considered as the possession of the wife; and in a further part of the opinion it is intimated that, if he persists in his claim, he must be made a defendant to the suit. Well, in that state of circumstances, and having been so advised, he became the next friend of his daughter in a suit instituted by her for the purpose of asserting her title to the prejudice of his own title; and in the year 1830 a decree was made, declaring the rights of the plaintiff, and that she was entitled, and was entitled in fee, as from the death of her mother, displacing, therefore, the estate by the curtesy in him. Following upon that decree, in the year 1833 he presented a petition, to have the rents and profits of the estate paid to him for the maintenance of the daughter; and upon the hearing of that petition, and of the cause and further directions, he obtained an order for the payment of the rents to him for the daughter's maintenance during her minority. The same decree, or rather the original decree, had directed a partition of the estates. A partition had been made by the commissioner, and was to be carried into effect by a conveyance to be executed by the trustee. That con-

veyance was prepared in this way : a term of years is limited to him, which is calculated to endure during the minority of the daughter, in trust to dispose of the rents as the court of chancery should think fit, or otherwise for the maintenance and benefit of the daughter. In the course of preparing that conveyance, the gentleman who was instructed to prepare it, an eminent conveyancer, Master Senior, then at the bar, intimated an opinion that he, Mr. Stone, was entitled to the estate by the curtesy, and that opinion was communicated to him. It is said, however, at the same time there was communicated to him a retraction of that opinion by the gentleman who had given that advice. I do not perceive that that is alleged by the bill. The allegation in the bill appears to me to be, that the communication which was made to him was the communication of the written opinion given by Master Senior upon the subject of this party being entitled to the equitable estate. But whether the further opinion was or was not communicated to him, beyond all doubt the fact of the opinion having been given, and the fact of the retraction of the opinion, if he knew it, distinctly brought to his mind the question of his title. He entered, however, under these trusts, and acquiring possession of this estate under a trust created for the benefit of the daughter, he thinks it right, after the determination of the term under which alone he had acquired the possession, to continue in the possession of the estate. It is impossible that a party who has acquired possession of an estate under a trust for the benefit of another can afterwards be permitted to set up that possession as being a beneficial possession in himself. Undoubtedly, it was his duty, if he meant to claim adversely to the daughter, to have given up possession of the estate, and to have then set up his claim after he had redelivered possession; and I think it is important always that parties should be aware that, when they have acquired possession under a trust, they will not be permitted to hold that possession for the purpose of asserting a beneficial title in themselves. However, the question came distinctly before Mr. Stone in the year 1833. He continued in possession of the estate, as the daughter says, accounting to her for the rents in some sense down to the year 1843, or rather receiving the rents for her maintenance down to the year 1843. In the year 1843 she attained twenty-one, and no steps were taken by him to disturb the title of the daughter, no allegation of any mistake having been made by him, no intimation that he in any way disputed her title. In the year 1847 she married. No question was then raised by him, that I can find, upon her title to this estate; but, on the contrary, I find it distinctly stated in the affidavits on the part of the defendants, and not, that I can find, contradicted on the part of the plaintiff, that after the marriage, upon the occasion of Mr. Stone going to visit his daughter, he made a positive promise upon his going there that he would account to her in respect of the rents of the estate, and not until he was leaving the house of his daughter was any claim made by him or any assertion of title on his own behalf. Now, under these circumstances, I think it perfectly clear that Mr. Stone had deliberately determined not to set up any title which he might have

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*Ex parte Emery; In re Bradbury.*

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against his daughter, and that it would be a great injustice now to permit him to do so. In determining the question, however, on this ground, I desire to be understood as not intimating any opinion whatever that the plaintiff could have succeeded in this case if it had been more favorable to him than in the point of view to which I have referred; on the contrary, I concur in the opinion of my learned brother, that the length of time, coupled with the circumstances of the case, would have been sufficient to bar his claim; and upon that subject it may be very useful to refer to what is said by Lord Redesdale in *Cholmondeley v. Clinton*, 4 Bligh, 33; in the House of Lords, where many observations will be found having a pertinent bearing on the question, how far parties in this court are barred from setting up an equitable title, although there has not been the lapse of twenty years. My opinion, therefore, upon the whole clearly is, that this appeal must be dismissed, with costs. Perhaps, if I had had to deal with the case originally, I should have been of opinion that the bill should also have been dismissed, with costs; but being very reluctant to interfere with the discretion of the learned judge on the subject of the costs, and finding, in the note of what passed at the hearing, that there was a disclaimer on the part of the defendants of any intention to demand costs, as these costs have not been given by the decree, I think the justice of the case will be satisfied by dismissing the appeal, with costs.

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*Ex parte EMERY; In re BRADBURY.*

March 10, 1854.

*Annulling Adjudication — Petition to annul at the Instance of a Creditor.*

A party was adjudicated bankrupt, and the assignees sold chattels (alleged to have been mortgaged to A. B.) as being in the order and disposition of the bankrupt. The time had expired within which, by the 233d section of the Consolidation Act, 12 & 13 Vict. c. 106, the bankrupt could have petitioned to annul, but A. B. presented such petition, and the commissioner, on the ground of want of trading, annulled the adjudication: —

*Held*, upon appeal of the petitioning creditor, that as, upon the evidence, it appeared that the application to annul was made at the instigation of the bankrupt, the adjudication must be restored, the court declining to decide the question of trading.

THE petition in this case was presented by Mr. Emery, the petitioning creditor, by way of appeal from the decision of Mr. Commissioner Daniel, who had annulled the adjudication at the instance of an alleged creditor on the ground of want of trading. The facts appearing upon the petition, and supported by the affidavits, were as follows: Mr. Bradbury was adjudicated bankrupt on the 12th of August, 1853, as a shareholder in a company, the business of which was the getting and selling of ores. Part of his property consisted of goods and furniture in his house, where his wife's sister, Mrs.

*Ex parte Emery; In re Bradbury.*

Alcock, resided with him; and these goods and furniture were taken possession of by the assignees and sold, as being in the order and disposition of the bankrupt. This was done by the assignees, notwithstanding that, on the 17th of August, five days after the adjudication, Mrs. Alcock gave them notice that the goods and furniture were assigned to her by a bill of sale, dated the 2d of July, 1853, to secure a sum of money due from the bankrupt to her, and interest thereon. Immediately after the taking of the goods and furniture by the assignees, Mrs. Alcock brought an action of trover against them. The bankrupt was examined before the commissioner, on the 17th of November, 1853, and admitted that, within the last preceding six months, he had lost more than 20*l*. in one day by gambling bets on horses. The adjudication having taken place, Mrs. Alcock, in her character of creditor on the bankrupt's estate, presented her petition on the 7th of December, praying that it might be annulled on two grounds: first, that there was not a good petitioning creditor's debt, and, secondly, that there was no trading. The petitioning creditor opposed the petition, asserting and giving evidence of his debt, and at the same time disputing the reality of any debt due to Mrs. Alcock; and he asserted that the bankrupt was liable to the bankrupt laws, as, at the time he contracted his debt to him, the petitioning creditor, he was a member of an unincorporated and unregistered partnership or company, established for the purpose of getting and selling ore, carrying on its business by virtue of a deed granting a license to get minerals out of a certain specified property; that the deed of the company, or copartnership deed, did not purport to give any estate in the land to the members, but only a right, and that not an exclusive right, to enter and dig for the minerals; and that no fixed payment was reserved to the landlord, but the owners of the land were to be paid at a stated rate for the quantity of minerals, principally copper ore, actually obtained. The petitioning creditor, in addition to disputing the fact of there being any thing due to Mrs. Alcock, stated, by his affidavit, that he believed that the application to annul was made at the instance and instigation of the bankrupt, and to relieve him from the consequences, as to the refusal of his certificate, of his admissions of the losses by gambling transactions. Mrs. Alcock did not file any affidavit to contradict this; and it was stated, on her behalf, that she was too ill to be able to attend in court to be examined. The commissioner came to the conclusion, upon the evidence before him, that there was a good petitioning creditor's debt; but he held that the bankrupt was not a trader. The learned gentleman stated that, in his opinion, the bringing of the action of trover for the goods was sufficient to show that there was no collusion between Mrs. Alcock and the bankrupt; and, finally, on the 17th of February, 1854, he annulled the adjudication.

*Swanston* and *De Gex*, for the appellant. The objections to the judgment of the commissioner are two: it is submitted, first, that he has failed in point of law as to the question of trading, and, secondly, that, even supposing the law to be doubtful, the annulling an adjudication

*Ex parte Emery; In re Bradbury.*

cation being a matter of discretion, the commissioner has not exercised a proper judicial discretion in taking the course he has taken. Upon the question of trading, it seems plain that the bankrupt must be held to be a trader, as being a partner in an association or company getting and dealing in ores and other minerals, the same not being the produce of the land of the company. All that was done by these adventurers was to work under a license from the landowner, which license gave them no estate whatever in the land, they paying stipulated rents or royalties upon the amount of the ores raised; so that, in substance and effect, the company or partnership only bought minerals from the landowner at a stated price, which, after being brought into condition of sale, were sold by them, and the matter came within the rule in *Ex parte Harrison*, 1 Bro. C. C. 172, and was a mere buying and selling of chattels, which had the effect of making the bankrupt a trader within the meaning of the bankrupt laws. The learned counsel also cited and commented on the following cases: *Parker v. Wells*, 1 Term Rep. 34; s. c. 1 Bro. C. C. 178, n.; *Sutton v. Weeley*, 7 East, 442; *Ex parte Burgess*, 2 Glyn & J. 183; *Port v. Turton*, 2 Wils. 169; *Doe v. Wood*, 2 B. & Ald. 724; *Tredwen v. Bourne*, 6 Mee. & W. 461; *Warwick v. Bruce*, 2 M. & S. 205; *Norway v. Rowe*, 19 Ves. 144. The annulling of an adjudication is a matter in the discretion of the court; and as, by the 233d section of the Consolidation Act, (12 & 13 Vict. c. 106,) the bankrupt is clearly not entitled, in point of time, to petition for that purpose, as was adjudged in *Ex parte Carter*, 1 De Gex, M. & G. 212; s. c. 7 Eng. Rep. 112; and *Carter v. Dimmock*, 4 H. L. Cas. 337; s. c. 20 Eng. Rep. 19; the court will not affirm the decision of the commissioner in annulling the adjudication, but will leave the respondent, Mrs. Alcock, to her remedy at law, if she has any, upon the question she has raised with the assignees. They cited: *Ex parte Bowers*, 1 De Gex, M. & G. 460; s. c. 10 Eng. Rep. 1; *Ex parte Bower*, 1 Ibid. 468; s. c. 13 Eng. Rep. 562.

Knight Bruce, L. J. Counsel for Mrs. Alcock may confine their observations, in the first instance, to the question, whether this is a case in which the court ought, in the exercise of its judicial discretion, to interfere with what the commissioner has done.

*Bacon* and *Speed* argued that, as the commissioner had given full consideration to all the points urged before him, when the question of annulling the adjudication was heard, and, as he had come to the conclusion, in the exercise of his undoubted discretion, that the bankruptcy could not stand, this court would not, on light grounds, overrule his determination, but permit a decision, the result of full and careful inquiry, to stand.

*Hole*, appeared for the bankrupt.

*Swanston*, was not called upon to reply.

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*Ex parte Emery; In re Bradbury.*

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**KNIGHT BRUCE, L. J.** It is not necessary to give any opinion on the question whether this bankrupt was a trader; but I will assume, in the respondent's favor, that he was not. The adjudication took place in August last, and the bankrupt is precluded, by lapse of time, from questioning it. Whether it be good or bad, it must, as against him, be treated as good. If the application to annul had been by him, it is conceded that it must have failed. The party applying was Mrs. Alcock, who lived with the bankrupt, and had a bill of sale of his furniture to secure a debt, or alleged debt—probably a true debt—from him to her. The assignees sold these goods, as being in the reputed ownership, and within the order and disposition, of the bankrupt. Mrs. Alcock brought an action against them for damages for taking the goods; and if the adjudication be invalid—if there be no valid bankruptcy—Mrs. Alcock will be entitled to recover damages at law for this taking and conversion. After the time had elapsed within which the bankrupt could dispute the validity of the adjudication, he, in his examination before the commissioner, admitted an act of gambling sufficient to preclude him from ever obtaining a certificate. After this, the lady made an application to annul the adjudication. She was living at Birmingham, the site or domicile of the bankruptcy, and on that application, the petitioning creditor, Mr. Emery, filed an affidavit, stating his belief that the application was made at the instigation of the bankrupt and for his benefit. The bankrupt, who had the opportunity of doing so, has made no affidavit before us, nor has Mrs. Alcock. It may well be understood that she was not able to attend to be examined, or if she attended, that she would be made ill by an examination; but still, she might have made an affidavit, and she actually did make one in the court below. It must be taken that, in effect, the affidavit of the petitioning creditor is wholly uncontradicted. It is, on these materials, impossible not to come to the conclusion, that the application to annul was that of the bankrupt, made in the name of his sister-in-law, Mrs. Alcock. The bankrupt is alive and in this country, and could have tendered himself for examination, had he been so disposed; but he has not. Under these circumstances, we are of opinion that, in the exercise of a sound judicial discretion, we ought to allow the adjudication to remain. Mrs. Alcock's right of proceeding at law we do not interfere with; but, for my own part, I am of opinion that the costs of the application to the commissioner ought to be paid by her.

**TURNER, L. J.** I am quite satisfied that no proceedings require more strict watching than proceedings of this nature in bankruptcy. I am of opinion that it would be very dangerous to allow other parties to take proceedings at the instance of a bankrupt to annul the adjudication, when he himself clearly could not do so. Here we have a distinct affidavit, by the petitioning creditor, that he believes the present proceedings to annul are taken at the instigation of the bankrupt, and there is no evidence to contradict this. It is said that the facts of the case show this belief to be ill founded; but I think that the facts tend the other way. Mrs. Alcock did not make any

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*Ex parte Page; In re Hammond.*

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application to annul until after the bankrupt had admitted the commission of acts which would prevent his ever obtaining a certificate. I think she must pay the costs of the proceedings before the commissioner; the petitioner's costs of the present appeal must come out of the estate, and there will be no order as to Mrs. Alcock's costs of the appeal.

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*Ex parte PAGE; In re HAMMOND.*

March 17, 1854.

*Messenger's Fees — Balance due under old Bankruptcy.*

A commission of bankruptcy issued in 1817. A. B. acted as messenger from that time until 1821, and he was paid the greater part of his claim on account. Many years afterwards, moneys came to the hands of the official assignee, and the executors of the messenger petitioned for payment out of these moneys of the balance remaining due; but the court, concurring in the view of the commissioner who had refused the application, declined to make any order.

THIS was an application by the executors of the late Mr. H. Page, to obtain payment out of a fund which had unexpectedly come to the hands of the official assignee of Mr. Hammond, the bankrupt, of a sum of 14*l.* 13*s.* 6*d.*, the balance of Mr. Page's account as messenger. The commissioner had refused the application. The commission against Mr. Hammond was issued in October, 1817, and assignees were appointed soon afterwards. Mr. Page acted as messenger from the issuing of the commission down to 1821, and his account amounted to 94*l.* 3*s.* 6*d.*; he received 80*l.* on account, leaving the balance now claimed still due to him. Mr. Page died in 1832.

*Bacon*, in support of the petition, argued, that the mode in which it was notorious that messengers acted under the old system of bankruptcy, namely, of requiring payment of, or rather stopping, their allowances out of the money realized, wholly precluded the notion or any presumption that this balance of 14*l.* 3*s.* 6*d.* had ever been paid. True it was, that a messenger had a legal demand against the petitioning creditor, but no one ever heard of a messenger enforcing that right against such person; as the affidavits were precise on the subject of payment of part, and of the remainder being due to the estate of Mr. Page, it was plain the money was due, and this was the more plain from the fact that the books of Mr. Page did not contain any entry of payment of the balance.

**Knight Bruce, L. J.** This petition has a very ancient appearance. There is nothing in proof, excepting the books of Mr. Page, and that is negative proof, to show that this sum has not been paid, because no entry therein appears of payment to him of this balance. As to the argument that messengers had rights against the petitioning cred-

*Ex parte Dimsdale; In re Dimsdale.*

itor, that is still more alarming, for if we concede on this occasion, who knows but that the whole body of messengers and their representatives may not be resuscitated in respect of such bygone claims. I think, and so my learned brother thinks, that we had better decline to make the order asked, and leave the applicant, without either encouraging or discouraging him from such a course, to bring the matter again before the court, if he shall be so advised.

TURNER, L. J. That is the better course to take.

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*Ex parte DIMSDALE; In re DIMSDALE.*

November 19, 1853.

*Summons under Section 120 of the Consolidation Act — Bankrupt —  
Official Assignee — Service.*

A bankrupt cannot without the concurrence of his assignee or assignees obtain a summons for the examination of a party under the 120th section of the Consolidation Act, (12 & 13 Vict. c. 106,) who is suspected of having bankrupt's property.

THIS was an appeal, by the bankrupt Dimsdale, from a decision of Mr. Commissioner West, of the Leeds district, refusing to issue a summons to one Mr. Hutton, to attend and be examined before the court, he being a person alleged to be possessed of property, part of the bankrupt's estate, the charge of the possession of such property being grounded on certain accounts relating to matters in the bankruptcy so long back as the year 1813, and which appeared from the statements, made on behalf of the petitioner himself, to have been investigated in 1851. There was no trade assignee, and the official assignee made an affidavit in which he swore that he had fully examined those particular accounts, and that in his opinion not the slightest benefit would accrue to the estate of the bankrupt by the proposed examination of Mr. Hutton.

*Sturgeon*, appeared in support of the petition, and stated in answer to a question from the court, that the official assignee had not been served, but as Mr. Hutton, the person who was proposed to be examined, was, it was believed, able to give the court valuable information, so as to enable it to judge that the summons ought to issue, that gentleman had been served. The court would see that the words of 120th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106) gave a very wide authority, for it enacted, "that after adjudication it shall be lawful for the court to summon before it any person known, or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, or any person the court may believe capable of giving information concern-

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*Ex parte Castelli; In re Castelli.*

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ing the person, trade, dealings, or estate of the bankrupt;" and then it gave power to require the production of books and papers, and authority to arrest such person if obedience were not shown to the summons without lawful impediment. The bankrupt, by his petition and his affidavit in support of it, showed that Mr. Hutton could most probably give valuable information concerning the estate, and the commissioner ought to have issued the summons. The learned counsel went at length into the merits of the case.

*Palmer*, appeared for Mr. Hutton, and although submitting that it was wholly unnecessary that he should have been served, he was willing to waive all technical objections as to the non-service of the official assignee, who alone was interested in the question. He submitted that there were no merits; and as the whole proceeding was irregular, the application ought to be refused, with costs.

*Sturgeon*, in reply.

Knight Bruce, L. J. There does not appear to me to be the slightest ground shown for the interference of this court with the discretion exercised by the commissioner. As at present advised, I am of opinion that an application for such a summons, as is indicated by the 120th section of the Bankrupt Law Consolidation Act, cannot be applied for by a bankrupt without the concurrence of his assignees. As the official assignee, who ought to have been served if any one was, (there being no other assignee,) has not been served, and further, as the proposed examinant, Mr. Hutton, who ought not to have been served, has been served with this petition of appeal, the same must be dismissed, and Mr. Hutton must be paid his costs by the bankrupt.

TURNER, L. J. I am wholly of the same opinion, and the more especially as the accounts relate to matters so remote as the year 1813, and as such accounts have been investigated three years ago and have never been complained of until now. The appeal petition must be dismissed, with costs to be paid to Mr. Hutton, who has been served with it, by the bankrupt.

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*Ex parte CASTELLI; In re CASTELLI.*

July 8, 1854.

*Action to try Validity of Bankruptcy — Costs.*

Two out of four bankrupts appealed from the adjudication, and the court of appeal gave them leave to try the question in an action, upon the undertaking of their solicitors to abide by such order as the court of appeal might make as to costs. The adjudication was sustained at law: —

*Ex parte Castelli; In re Castelli.*

*Held*, that the appeal must be dismissed, but without costs; the solicitors, in pursuance of their undertaking, to pay the costs of the action.

THE earlier points upon this bankruptcy were reported in 21 Law J. Rep. (N. S.) Bankr. 5; s. c. 8 Eng. Rep. 280, and 22 *Ibid.* Bankr. pp. 67, 76; s. c. 19 Eng. Rep. 492, in the case of *Ex parte Braggiotti* and *Ex parte Castelli*. The point now coming before the court was, in the nature of further directions, as to the costs of an action brought under the leave of the court to try the validity of the adjudication, and the liability to costs of the solicitors of the appellant bankrupts under an undertaking given by them. The facts were shortly these: on the 8th of November, 1851, Frank Castelli, Giovanni Baptista Giustiniani, Saverio Castelli, and Francesco Francescovitch Braggiotti, were adjudicated bankrupts by Mr. Commissioner Holroyd, on the petition of Messrs. Lafuente and Webster. On the 9th of December following, Saverio Castelli and Giustiniani showed cause against the adjudication before the commissioner, but he affirmed it; whereupon, on the 22d of January, 1852, they appealed to the Lords Justices against the commissioner's decision, and the court gave them liberty to try the validity of the adjudication by action against the official assignee as the nominal defendant, upon their giving security for costs, they being then out of the jurisdiction of the court. They availed themselves of this liberty, and an order was accordingly made, and their solicitors, Messrs. Oliverson and Lavie, gave their undertaking to abide by any order which this court might think fit to make as to the costs of the action, unless they should substitute a security for such costs, to be settled by the Master of the Queen's Bench; the petitioning creditors were ordered to defend the action and to indemnify the official assignee; no execution was to issue without leave, and the petition of appeal was ordered to stand over, with liberty to apply. The action came on for trial, before the Court of Queen's Bench, on the 9th of July, 1852, when an order was made for a special case on the following terms: With the consent of all parties the jury find a verdict, with 10,000*l.* damages and 40*s.* costs, subject to a special case: "If judgment in favor of the defendant, the appeal to be dismissed, and all proceedings before the Lords Justices to be at an end, except the defendant's application against Messrs. Oliverson and Co. for costs, which is not to be prejudiced." On the 30th of June, 1854, judgment was given against both the bankrupts by the Court of Queen's Bench upon the special case, and on the 6th of July judgment was signed for the nominal defendant, (the official assignee,) and against the two bankrupts.

*Malins*, and *Hardy*, now appeared in support of an application that the petition of appeal of Saverio Castelli and Giustiniani might be dismissed, with costs; and further, that Messrs. Oliverson and Lavie might be directed to pay the costs, both of the appeal and of the common law proceedings, amounting, as they stated, to upwards of 1,000*l.* They contended that the bankrupts having been enabled to appeal and to prosecute the action and other proceedings at law by reason

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*Ex parte Hunt; In re M'Kenna.*

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of the security offered by the undertaking of their solicitors, it was but right that the estate should not be burdened in any way with the costs of an unsuccessful experiment to annul the adjudication, and, therefore, that the court should call upon their solicitors to bear all the expenses.

*Cairns*, for the bankrupts, argued that as the proceedings in the action at law and under the special case were no more than a part of the proceedings before this court upon the appeal, and were, in fact, no more than a continuance of those proceedings, and as the practice of the court was to permit a bankrupt at the cost of his estate to dispute the bankruptcy,—and further, as the undertaking of the solicitors covered only such costs as the bankrupts themselves would be liable to pay, it was manifestly unjust that those gentlemen should be ordered to bear costs for which their clients would not be responsible. If the court should make any such order as that asked, it would be in effect to fine and mulct the bankrupts for disputing the adjudication,—a course which would be the more hard as the court must itself have thought that there were reasonable grounds for such dispute, as it gave them liberty to bring the action.

KNIGHT BRUCE, L. J., after conferring with Turner, L. J., said: We consider the fair and proper course to be taken will be to dismiss this petition of appeal without costs, and to leave the costs of the action as they stand, the result of which will be that Messrs. Oliverson and Lavie will be liable, under their undertaking, to pay them.<sup>1</sup>

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*Ex parte HUNT; In re M'KENNA.*

July 21, and August 5, 1854.

*Scale of Costs for Sales by Tender in the Country.*

Where the stock of a bankrupt had been sold in the country by tender, the court directed that the taxation of the scale of charges for such sale should be the same as adopted in London, namely, a scale between the charges for sales by auction and sales by valuation.

THIS was the petition of Messrs. Hunt, accountants at Manchester,

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<sup>1</sup> During the argument, the court asked Mr. Swanston whether, as according to the old practice in bankruptcy, it was unusual to dismiss a bankrupt's petition to supersede with costs against the bankrupt, it was not usual to leave him exposed to the consequences of failure of proceedings in a court of law, even when the court gave him leave to bring an action to try the validity of the bankruptcy? The learned counsel stated that such was his view of the practice, speaking upon the impression of the moment. There was, however, he believed, a reported case, in which Lord Eldon had directed his attention to the subject.

*Ex parte Hunt; In re M'Kenna.*

presented by way of appeal from a decision of Mr. Commissioner Skirrow, by which he had taxed the bill of costs for the sale by tender of the stock of the bankrupt M'Kenna, a draper, at the sum of 46*l.* 6*s.* 11*d.*, that being the scale of charges for such amount of business had it been effected by valuation. It appeared that at Basinghall-street there were three scales of charges; namely, that where the sale was by auction, which was the highest, that where it was by tender, which was lower, and that where it was by valuation, which was the lowest. In the present case the charges in London would have been, if the sale had been by auction, 82*l.* 8*s.* 11*d.*; if by tender, 63*l.* 15*s.* 8*d.*; if by valuation, 46*l.* 6*s.* 11*d.* In the country districts this practice had not been adopted, and only the larger and smaller scales were recognized, and therefore the commissioner had taxed the bill at the sum before mentioned.

*Karslake*, in support of the petition, stated that it appeared upon the affidavits that the sale in this case by tender had been beneficial to the estate of the bankrupt.

[KNIGHT BRUCE, L. J. What jurisdiction have we?]

The jurisdiction appears clear in this way; by the 83d section of the old act, 5 & 6 Vict. c. 122, the settlement of bills of costs of persons employed in the bankruptcy was provided for, and although that section does not appear to be reenacted in the Consolidation Act, 12 & 13 Vict. c. 106, yet as the 12th section of that statute, the words of which are very extensive, and quite sufficient to include such a matter as this, the court has authority to superintend and control all matters of bankruptcy, and to hear, determine, and make order in any matter of bankruptcy whatsoever, the creditors of a bankrupt could submit their demands to the decision of the commissioner, the commissioner forming part of the court, and that being so, such submission would draw with it a right of appeal to your lordships. The practice of the commissioner taxing bills of this description has become universal, and cannot now be objected to; and, indeed, in this case no objection is made.

[KNIGHT BRUCE, L. J. But we take the objection. We cannot be made to exercise a jurisdiction which the statute has not conferred upon us. The section of the consolidation act does not relate to the cases of tradesmen, or other persons employed by the assignees, and we might as well be called upon to affix the amount of remuneration to be paid to a carter for removing the bankrupt's goods as to settle this dispute. There is a bill now before parliament which shows that the framer does not consider we have this jurisdiction, for one of its clauses proposes to confer it.]

The petitioners have submitted to your lordships' jurisdiction, as they did to that of the commissioner, and it is most desirable that this court should examine it so as to enable the petitioners to know what scale they can hereafter charge for business transacted in this particular mode, they being extensively employed in such matters; and they confidently submit, that the commissioner having accepted the jurisdiction, the right of appeal follows as a matter of course.

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*Ex parte Hunt; In re M'Kenna.*

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*Little*, for the assignees.

KNIGHT BRUCE, L. J. The commissioner has been kind enough to accept the jurisdiction, but that does not rule us. We have no jurisdiction, and, therefore, we shall dismiss the petition unless the petitioner shall desire to take the opinion of the Lord Chancellor, in which case we shall satisfy ourselves with abstaining from making any order at all.

TURNER, L. J. I entirely concur in the view of the law taken by my learned brother, and am quite willing to abstain from making any order if the petitioners wish it.

*Karslake*. The petitioners accept that offer, and will apply to the Lord Chancellor.

*August 5.* *Karslake* renewed his application before the Lord Chancellor, urging the same line of argument, and submitted that as the assignees were themselves anxious to have the opinion of the court to guide them hereafter as well as now, and as the petitioners were willing to be bound, there was ample jurisdiction.

*Little*, for the assignees.

THE LORD CHANCELLOR, (LORD CRANWORTH.) In one sense the petitioners are within the jurisdiction of the court, for the assignees substantially ask its sanction to the payment of the bill upon a certain scale, and the petitioners consent to be bound. Apart from that, however, I think the scale of allowance ought to be the same in the country as in London. The most troublesome mode of selling is by auction, and the largest scale of remuneration is allowed for it; the least troublesome mode of selling is by valuation, and accordingly the lowest scale of charge is given. An intermediate course of proceeding, namely, that by tender, is a very useful one in disposing of the stock of some trades. For this there is in Basinghall-street an intermediate scale of charge, and I consider that course very reasonable. Let these bills be settled on that scale, and let the costs be paid out of the estate.

M'Cormick v. Garnett.

## M'CORMICK v. GARNETT.

May 2, 1854.

*Baron and Feme — Wife's Equity for a Settlement — Husband's Domicile — Practice — Proof of Foreign Law.*

A fund was in court belonging to a married woman, she and her husband being both domiciled in Scotland. The husband and wife had, by memorandum, assigned this fund to a creditor of the husband. By the law of Scotland, a husband is absolutely entitled to his wife's personal estate: —

*Held*, that the wife had no equity for a settlement.

Although a point of foreign law has been proved in this country and acted upon in reported cases, the courts will not act upon such decisions without the law being proved in each case as it arises.

THIS was an appeal from a decision of Vice-Chancellor Stuart under the following circumstances. A suit was instituted for the administration of the estate of William M'Cormick, the testator in the cause, who, by his will, dated the 14th of May, 1840, bequeathed a legacy in the following words: "I bequeathe to Mary Macdonald, wife of John Macdonald, of Ben Nevis, North Britain, distiller, 500*l.* sterling." John Macdonald and his wife were both domiciled Scotch people.

On the 16th of July, 1847, a memorandum of agreement was signed by John Macdonald and his wife, by which they agreed that a sum of 500*l.*, due from John Macdonald to William Macdonald, should be paid by means of this legacy, which should be appropriated to it. John Macdonald owed the testator 200*l.*, and on the legacy being claimed the executors required a set-off against the legacy in respect of this debt due from John Macdonald to the testator.

On the 28th February, 1854, the cause was heard, on further directions, before Vice-Chancellor Stuart. John Macdonald and his wife and William Macdonald appeared by counsel, and asked for a transfer of the legacy to William Macdonald; but his Honor ordered a sum of bank annuities, equal in value to one moiety of the sum due for principal and interest in respect of the legacy, to be carried over to a separate account, entitled, "the account of Mary Macdonald and her children," and directed the dividends to be paid to her on her separate receipt during her life or until further order, with liberty to apply after her death; and he directed that the other moiety, after deducting thereout the debt of 200*l.*, in respect of which the set-off was claimed by the executors, should be paid to William Macdonald.

From the above decision John Macdonald and his wife and William Macdonald joined in a petition of appeal, which, after setting forth the foregoing facts, prayed that the decree might be varied, and that the court would direct a transfer to the petitioner, William Macdonald, of so much of the fund as had been directed by the decree to be carried over to the separate account of Mary Macdonald and her children. An affidavit was filed to show that there had been no set-

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M'Cormick v. Garnett.

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tlement or agreement for a settlement of the fund in question either before or after the marriage between John and Mary Macdonald. It appeared, also, although not in evidence, that a Scotch advocate had given his opinion upon the point of a wife's equity for a settlement, in similar circumstances to those above set forth, and had declared that she possessed no such right; but it was admitted that this opinion was not given in the present suit or with reference to it.

*Craig* and *Renshaw* appeared for William Macdonald, and stated that the Vice-Chancellor had, upon the hearing before him, refused to grant a commission for the examination of the wife of John Macdonald on the ground of the expense; and although the wife was an applicant by counsel with her husband and William Macdonald for the payment of the fund to the latter, his Honor had directed the settlement to be made. They submitted that the question in reality to be decided was, whether the wife of a domiciled Scotchman had any equity for a settlement, the law of Scotland being, as appeared from the opinion of the Scotch advocate, that, by the fact of marriage, a husband became absolutely entitled to the whole of his wife's personal estate of every description; and further, that as the law of domicile governed the case, the petitioners were well grounded in their appeal. *Sawyer v. Shute*, Anst. 63; *Campbell v. French*, 3 Ves. 321; and *Dues v. Smith*, Jac. 544; cited in *Roper on Husband and Wife*, Bright's ed. 91. They also referred to the case of *Lowe v. Smith*,<sup>1</sup> recently decided by Vice-Chancellor Kindersley, in which the court held that a domiciled Scotchwoman had no equity for a settlement. It was in that case that the opinion of the Scotch advocate, on which reliance was now placed, was taken, and was acted upon by Vice-Chancellor Kindersley; and although that opinion was not actually in evidence, it was submitted that, when the principle of foreign law had been acted upon in cases here, it would be adopted in subsequent cases. That undoubtedly would be the case where the cases in which such allegation of the law had been acted upon were reported.

[KNIGHT BRUCE, L. J. Any other case cannot decide foreign law as a matter of fact here. However inconvenient it may be in some cases, it is a rule that foreign law must always be proved in each particular case, like any other matter of fact. It can make no difference that a particular view of foreign law has been acted upon in reported cases. The matter, as a matter of fact, must be proved.]

*Renshaw* appeared also for John Macdonald.

*Dauney*, for Mrs. Macdonald.

*Cairns*, for the plaintiff, offered no opposition.

KNIGHT BRUCE, L. J. In strictness, as the petitioners were not

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<sup>1</sup> Not reported.

*Ex parte Macanlay; In re The Lancashire and Yorkshire Railway Co.*

parties to the administration suit, but only petitioners, the proper form of decree would have been to carry over this particular fund to separate account of the husband and wife. Such an order as that now asked is not regular. I have already said that the court cannot take judicial notice of what the foreign law is upon this subject, but is obliged to treat it as a question of fact. That being so, evidence of the foreign law applicable to this case must be produced, and upon that being done, and the law of Scotland being proved to be as has been here asserted, the fund will be paid to the husband and his assignee.

TURNER, L. J. Upon the opinion of the Scotch counsel being verified to be as stated, the decree may be altered as prayed.

*Ex parte MACAULAY; In re THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.*

July 29, 1854.

*Railway Company — Reinvestment of Money for Lands taken — Leaseholds.*

Freehold and copyhold hereditaments were taken by a railway company, and the money paid into court:—

*Held*, that the money could not be reinvested in leasehold property.

CERTAIN freehold and copyhold lands were taken by the Lancashire and Yorkshire Railway Company for the purposes of their line under the powers in their act. These lands, at the time of the purchase, were limited in strict settlement. The company paid the purchase-money into court. The parties entitled under the settlement were desirous that the money should be laid out in the purchase of a long leasehold estate for a term, created in 1687, of 1,000 years, at a very trifling rent, and which the termor held without impeachment of waste. The rent had not been paid for many years, and, although inquiry had been instituted, the reversioner could not be discovered. By the 69th section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, it is directed that money arising from the sale of settled estates to a company, shall be laid out in the purchase of other lands, "to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner as the lands in respect of which such money shall have been paid," stood settled before the purchase. The clause in the company's act relating to reinvestments, was in the same terms.

*Dart*, in support of the application, stated that the point had been brought before Vice-Chancellor Stuart, who, doubting the propriety of making the order, had directed that the question should be sub-

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mitted to their lordships. The evidence before the court showed that the leasehold land proposed to be purchased, was locally situated so as to be held very advantageously with the remainder of the settled property, a small part only of which had been taken. The leasehold land consisted of between four and five acres, and lay between the estate and the road leading to the neighboring village. The parties wished the land to be assigned upon trusts as nearly as could be corresponding with the uses of the settlement. One of their lordships, (Lord Justice Knight Bruce,) when a Vice-Chancellor, had permitted a reinvestment of money produced by the sale of freehold lands to be made in copyholds of inheritance. *Re Cann's estate*, 15 Jur. 3; the Master having reported in favor of such an investment.

*Bacon*, appeared for the company.

KNIGHT BRUCE, L. J. We think that the words of the act ought to be adhered to. The case cited has gone quite far enough, and we are by no means disposed to relax the rule any further.

TURNER, L. J. The application must be refused.

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JAMES v. RICE.

June 9, 1854.

*Usury — Security on Land — Deposit of Deeds — Parol Agreement — Equitable Mortgage.*

Where a person, at the same time that he gave a promissory note for money borrowed at 6l. per cent. interest, deposited title deeds of land as a further security, and upon a further advance entered into a parol agreement with the lender to execute a mortgage of the same lands as a security for the whole amount at 5l. per cent. :—

*Held*, that although (as already decided by one of the Vice-Chancellors) the original deposit was not valid as being obnoxious to the usury law, (12 Anne, stat. 2, c. 16,) yet that the parol agreement created a good equitable mortgage notwithstanding that the deeds were not at that time and on that occasion delivered by the borrower to the lender, but had remained in the lender's possession from the time of the former transaction.

\* THIS was an appeal from the decision of Vice-Chancellor Wood, 23 Eng. Rep. 567, where the facts are fully stated.

*Prior*, for the plaintiff. In the court below reliance was placed upon *Nixon v. Phillips*, 7 Exch. Rep. 188; s. c. 8 Eng. Rep. 531, and the observations of Parke, B., in *Doe v. King*, 11 Mee. & W. 333, as showing that the original deposit was not obnoxious to the usury laws; but, considering their lordships' decision, in *Ex parte Warrington*, *in re Leake*, 3 De Gex, M. & G. 154, s. c. 19 Eng. Rep. 26, it seemed hopeless further to insist upon the point. It was, however,

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open to the plaintiff to insist, it being admitted that there was no writing, that the statute of frauds was no defence. The bill had been taken *pro confesso*, and the case stood in the same position as if the defendant had put in his answer containing an admission of all the allegations and statements in the bill, without claiming the benefit of the statute of frauds, and in such case a decree must have been made in the plaintiff's favor. The case of *Skinner v. M'Donnell*, 2 De Gex & Sm. 265, showed that if the benefit of the statute was wanted, it must be expressly claimed. As to the merits, they were all in the plaintiff's favor; and although, under the circumstances, the defendant might have brought an action of trover for the deeds, and the Court of Chancery would not have restrained the action; still, he could not have resorted successfully to the Court of Chancery for its aid without tendering the money advanced and legal interest. The deeds being in the plaintiff's possession, and there being a parol agreement to effect a mortgage, that agreement operated to create a new and good equitable mortgage for the whole amount lent, with legal interest at 5% per cent. A delivery back to the defendant, and a redelivery of the deeds to the plaintiff, were wholly needless, as appeared from *Ex parte Kensington*, 2 Ves. & B. 79; s. c. 2 Rose, 138, and *Ex parte Nettleship*, 2 Mont. D. & D. 124; s. c. 10 Law J. Rep. (N. S.) Bankr. 67; which it was proper to state were not cited before the Vice-Chancellor. He cited, also, *Ex parte Lloyd*, 1 Gl. & Jam. 389.

TURNER, L. J. The deeds being in the plaintiff's hands, and there being a parol agreement to execute a legal mortgage to him, we are of opinion that the case falls within the principle of *Ex parte Kensington*, and the other cases cited, and that the plaintiff is entitled to a decree. Upon the record, therefore, being produced in court, let there be the usual decree as upon an equitable mortgage upon the footing of the verbal agreement to execute a mortgage.

KNIGHT BRUCE, L. J. That is my view also of the case.

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EVANS v. EVANS.

May 10, 1854.

*Practice — Demurrer.*

Where a question had been decided in one suit, and the same point was raised between other parties in another suit, the court, upon appeal, declined to decide the case upon demurrer.

A QUESTION arose upon a will, whether certain real estates passed by an appointment, and Vice-Chancellor Kindersley decided that they did not. The same point upon the same will was brought

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before the court by another party interested, but who was not a party to the former proceedings, and to the new suit demurrers were put in. His Honor, in accordance with his former judgment, overruled the demurrers, whereupon the defendant appealed.

*Tripp and Pearson*, for the appeal.

*Daniel and Greene*, for the bill.

KNIGHT BRUCE, L. J. Lord Hardwicke in an old case, *Brownsword v. Edwards*, 2 Ves. sen. 243; remarked that "where there was any doubt he would not determine the question upon demurrer, but would, notwithstanding the inclination of his opinion might be in favor of the demurring defendant, overrule the demurrer, without prejudice to such defendant's right to insist upon the same matter of defence by way of answer." This I consider to be the practice of the court; and as after the former decision of the learned Vice-Chancellor it is impossible to treat the question as one free from doubt, I must, for one, decline hearing it upon demurrer.

TURNER, L. J. I quite concur in that view. The order will be to affirm the overruling of the demurrers without prejudice to any question, and reserve the costs of the hearing of the demurrers both before the Vice-Chancellor and before this court.

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### MILNE v. GILBERT.

July 7, 1854.

#### *Will, Construction of—Intestate's Husband—Statute of Distributions.*

A testator gave his personal estate to trustees upon trust for his daughters, for their respective lives, in equal shares; and if any died without issue their shares were to be held in trust for the person or persons who would at their death respectively be entitled, as next of kin or otherwise, to their respective personal estate under the statutes made for the distribution of intestates' effects, and in the same proportions and manner as they would be entitled by virtue of such statutes if they had then respectively died intestate. One of the daughters died without leaving any child surviving:—

*Held*, that her husband was not entitled to her share.

THIS was a petition presented in the cause, and was originally heard by the Lords Justices, Lord Justice Knight Bruce and Lord Cranworth, for the late Vice-Chancellor Parker; it was now brought on by leave, in the nature of an appeal from that decision, their lordships having dismissed the petition. The facts were, that Richard Milne, the testator in the above-named cause and two other causes, by his will, dated the 12th of April, 1841, after directing that the

residue of the proceeds of his real and personal estate left after payment thereof of his debts and funeral and testamentary expenses, and legacies, should be invested, declared that the trustees of his will should stand possessed of one ninth part thereof, upon trust for the children of the testator's nephew, Thomas Scholes Withington, deceased, by Elizabeth his wife, who being a son or sons should attain the age of twenty-one years or die under that age, leaving lawful issue them respectively surviving, and who being a daughter or daughters should attain that age or be married, equally to be divided between or amongst them, if more than one, share and share alike, and if there should be but one such child, the whole for such child. And the testator thereby gave the following directions as to the shares of such of them as should be daughters: "And my will is, and I further declare and direct, that the share or shares in the same trust premises of such of the said children of the said Thomas Scholes Withington, deceased, who shall be a daughter or daughters, shall, upon her or their attaining the said age of twenty-one years or marrying, be held and retained by the said trustees or trustee for the time being of this my will, upon and for the trusts, intents, and purposes, and with, under and subject to the powers, provisos, and declarations following, that is to say, upon trust from time to time to receive the dividends, interest, and annual produce arising from the share of each and every such daughter, of and in the said trust premises, and to pay thereout, or (if need be) out of the capital or principal of such share, the yearly sum of 60*l*. and no more to each and every such daughter until she shall attain the age of twenty-four years, and to accumulate the surplus income arising in the mean time from each such share at interest, and add the accumulations to the principal; and after such daughters respectively shall have attained the age of twenty-four years, to pay the whole of the said dividends, interest, and income thenceforth arising from the share of each and every such daughter and the accumulations thereof to each such daughter during her natural life;" (for their respective separate use and independently of their respective husbands, and their receipts to be good discharges;) and after their respective decease, "upon trust to pay, assign, and transfer the share or respective shares of the said trust moneys, stocks, funds, securities, and premises in which such daughter or daughters respectively had a life interest, with the accumulations aforesaid, (if any,) unto her and their respective child and children, to be equally divided between or amongst such children, (if more than one,) share and share alike; and if there be but one such child, the whole of his or her parent's share to be in trust for that one child; the share of each and every such child being a son to be vested in and payable to him at his age of twenty-one years, or being a daughter at her age of twenty-one years or day of marriage, which shall first happen," (with provisos for maintenance and education.) "And in case any one or more of such daughters of my said nephew, Thomas Scholes Withington, as aforesaid, shall die without leaving any child who shall live to acquire a vested interest in her or their said share or respective shares of the said trust premises under the trust last afore-

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said, then the share or shares of such daughter or daughters respectively so dying shall respectively go and belong to and be held in trust for the person or persons who would, at the time of the decease of such daughter or daughters respectively, or of the decease or failure of her or their child or children respectively (whichever event shall last happen) be entitled, as next of kin or otherwise, to the personal estate of such daughter or daughters respectively, under the statutes made for the distribution of intestate's effects, and in the same proportions and manner as they would be entitled by virtue of such statutes if such daughter or daughters respectively had then died intestate."

The will then contained a bequest of one other ninth part (subject to any annuity) in trust for the children of Henry Withington, and in that bequest the trusts for daughters after their respective deaths were declared to be "for the benefit of their respective issue, and with the same or like ultimate trust or limitation over in favor of their next of kin in default or failure of their issue respectively," as declared with respect to the former ninth part. The testator died on the 18th of August, 1841, whereupon the above-mentioned suit was instituted for the administration of his estate. On the 20th of September, 1844, Alice Elizabeth Eccles, one of the daughters of Thomas Scholes Withington, and who had previously married Mr. Eccles, attained her age of twenty-one years, and her share of the trust funds was carried over to a separate account. She died in June, 1852, having had issue one child only, which died an infant and unmarried, in her lifetime. Letters of administration were granted to her husband, Mr. Eccles, and the suit was revived against him, and he presented a petition, praying that the fund so carried to the separate account of his deceased wife might be paid out to him. When the petition was heard, before the Lords Justices, on the 5th of August, 1852, their lordships, as before stated, dismissed it.

*Elmsley*, in support of the petition, submitted that the petitioner, Mr. Eccles, was entitled to the fund under the words: "next of kin or otherwise," contained in this clause. It was a rule of construction that a meaning should, if possible, be given to every word of an instrument, and it was only by construing this clause as giving the husband a title to the fund, that effect could be given to every word in the clause. The only way to give effect to the words "or otherwise," was to read the clause as if the words were "in trust for the person or persons who, at the time of such daughter dying, shall be entitled to her personal estate under the statute for the distribution of intestates' effects otherwise than as a person or persons entitled as next of kin under the same statutes." All persons were included in the words "next of kin" who could claim under the statute, save and except the husband or wife of an intestate; and as the case provided for by the testator in this clause was the death of a daughter, the only person to whom the words "or otherwise" could apply was a husband surviving, for unless that were so the words "or otherwise" must be struck out, which was contrary to the rule of construction

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before alluded to. A husband had a right at common law, and the legislature did not intend to interfere with it, for it being supposed that the statute 22 and 23 Car. 2, had that effect, the statute of frauds, 29 Car. 2, contained a clause expressly to restore such right. From this it was plain, that the husband had a right under the statute as he had at common law, and this was recognized by many dicta of eminent judges, although it was admitted that it was not so expressly decided. In *Withy v. Mangles*, 10 Cl. & F. 251, — Lord Cottenham observed: "The appellant can only succeed by showing that the term 'next of kin' had, by a technical and conventional construction, obtained the meaning of 'those who would be entitled in case of intestacy under the statute of distributions;'" and his lordship went on afterwards to say: "to give such a construction to the words would be under the term 'next of kin' to include persons not of kin as well as husband and wives." From this it was plain that Lord Cottenham considered husband and wife as persons who were entitled to shares in an intestacy as next of kin under the statute of distributions. In the case of *Brandon v. Brandon*, 3 Swanst. 321, Sir Thomas Plumer said: "the word 'family' has, for the same reason, received the like construction; and with a like exception of the husband and wife, and, therefore, not precisely conformable to the provisions of the statute." It had also been long before observed by Lord Hardwicke, in *Elliott v. Collier*, 3 Atk. 527; s. c. 1 Ves. 15; "upon the equity of the statute of distributions, this court makes an administrator *de bonis non* only a trustee for such part of the testator's personal estate as is undisposed of for his next of kin. Therefore, I am of opinion the husband's representative is entitled to the wife's personal estate, and that it vested in the husband before administration was taken out." The case of *Cart v. Rees*, which was cited in *Squib v. Wyn*, 1 P. Wms. 381, was also important. There a wife died possessed of *choses in action*, and the husband who survived her died before taking out letters of administration to her estate, and then the next of kin of the wife administered. In that case, Lord Parker was reported to have said, that the administrator of the wife was but a trustee for the executor of the husband, "the right to the wife's *choses in action* being, by the statute of distributions, vested in the husband as next of kin to the wife;" and the report went on to say: "And whereas there is a proviso in the Statute of Frauds, 29 Car. 2, saying that the Statute of Distributions shall not extend to the estates of *feme covert*s that die intestate, but that their husbands may have administration of their personal estate as before the making the act;" and his lordship is reported as observing "that this clause was made in favor of the husband, and not to his prejudice; so that it was intended by the parliament that the husband should be within the statute of distributions, so as to take the wife's *choses in action* as to his benefit, but should not be within the same as to his prejudice; and that this was not a new point, but had been settled, and upon very good reason; for, were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though ever so remote, which was not the intent of the statute." In that case

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also, Mr. Vernon cited Lady Aiscough's case, wherein he said Lord Cowper's opinion was the same with Lord Parker's, namely, that "the wife's *choses in action* did vest in the husband by the statute of distributions; so that since this resolution the right of administration follows the right to the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin to the husband in the same manner as it is granted to a residuary legatee." This long line of dicta, although it was admitted no authoritative decision could be added, was followed by the settled practice of the ecclesiastical courts, who to the present time had recognized and acted upon the doctrine; and to that must be added the fact that the statute 1 Will. 4, c. 40, (which directed that the residue of testator's estates should be held by executors as trustees for the next of kin, unless they were shown to be intended to take beneficially,) treated the husband as a person entitled under the Statute of Distributions. For all these very cogent reasons, and the more especially as the testator in the clause in question had not inserted the word "unmarried" as applicable to the daughters, it was reasonable to suppose that he intended the husband to enjoy the rights he had under the statute, and that was the construction for which the petitioner contended.

*Hetherington* followed on the same side.

*Wigram* and *Goldsmid*, for the next of kin of Mrs. Eccles, opposed the petition, and argued that the words "or otherwise" had no reference to the husband; that the 6th section of the Statute of Distributions contained the words "next of kindred, or those who legally represent them," showing that it was wholly unnecessary to interpret the words "or otherwise" as applicable to the husband; that whatever might be the effect of the dicta which had been cited, they were wholly and effectually overruled by a train of direct decisions. *Watt v. Watt*, 3 Ves. 244; *Garrick v. Lord Camden*, 14 Ves. 372; *Bailey v. Wright*, 18 Ibid. 49; *Cholmondeley v. Lord Ashburton*, 6 Beav. 86; *Kilner v. Leech*, 10 Ibid. 362, (which cases, together with that of *Elmsley v. Young*, 2 Myl. & K. 780, were cited at the former hearing.) They further argued that the title of a husband to have letters of administration granted to him of his wife's estate was *jure mariti*, and in nowise depended upon the statute; that the statute did not extend to any thing relating to the estate of a *feme covert* dying intestate: and lastly, that if the appellant were to succeed in his petition, it must be by striking altogether out of the clause the words "under the statutes made for the distribution of intestates' effects."

*Elmsley* was heard in reply.

TURNER, L. J. In this case, I am of opinion that the only safe course is to abide by the words of the will; there is no other means of collecting what the intention of the testator may have been, but by the words used in the will. Now, the disposition we have here to

consider is, in the events which have happened, that the fund is to go and belong to and be held in trust, for the person or persons who were, at the time of the decease of Mrs. Eccles, entitled, as next of kin or otherwise, to her personal estate under the statutes made for the distribution of intestates' effects, and in the same proportions and manner as they were entitled by virtue of such statutes. From that it appears, therefore, that before any person can claim a benefit under the clause, he must show himself qualified as a person entitled at the death of Alice Elizabeth Eccles, either as her "next of kin or otherwise, under the Statute of Distributions," and in no other character. The question is, does or does not the husband possess that qualification? Now, it is plain, upon the face of the Statute of Distributions, 22 & 23 Car. 2, c. 10, that that statute does mention other persons than the next of kin of the intestates; for in the 8th section the expression is, "the next of kindred, or those who legally represent them." The statute, therefore, affords a perfectly clear and plain interpretation, which falls in with the very language of this will; but if the words "or otherwise" had not been so open to explanation by reference to the language of the Statute of Distributions, there would still remain the question, whether the husband could possibly come in without being a person entitled to take under that statute. The Statute of Distributions particularly excludes the idea of the husband taking under it. The difficulty which arose under the Statute of Distributions, and which was disposed of by the Statute of Frauds, was not whether the husband had any right under the Statute of Distributions, but whether that statute had not taken away the common law right of the husband. It has been said that in the earlier cases upon the subject, an interpretation has been put upon the words "next of kin," as used in the statute, as entitling the husband; or, at least, that he was so treated in the earlier cases. That, however, is sufficiently answered by Lord Eldon's observation in *Garrick v. Lord Camden*, where he says: "Whatever may have dropped from judges, describing the husband as next of kin, or next legal friend of his wife, the tenor and bent of modern decisions go to this: that if a husband bequeathes to his next of kin, that *prima facie* does not include his wife; and it is quite clear that if a married woman, under a power by settlement, bequeathes to her next of kin, it would be impossible to hold, that under the construction of such a will, without more, the husband would take as sole next of kin." Whatever may be the dicta in favor of the husband, occurring in the earlier cases upon the subject, it appears to me that the whole course of the modern law upon the subject leads to a different conclusion. When the Statute of Distributions is represented by the Statute of Frauds, as expressly excluding the right of the husband, how can it possibly be said that he is a person entitled under that statute? Throughout the argument, I have endeavored to guard my mind against any bias arising from the former decision of this court upon the case. I entirely concur in the judgment of the Lords Justices at that hearing. See, 19 Eng. Rep. 228. My own opinion is in ac-

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Senhouse v. Hall.

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cordance with theirs, and I think this petition should be dismissed, with costs.

KNIGHT BRUCE, L. J. The letter of the instrument is against the husband, and the spirit is not with him.

*Appeal dismissed, with costs.*

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SENHOUSE v. HALL.

February 21, 1854.

*Practice — Appeal — Right to begin.*

Where an appeal is brought by a defendant against the whole decree, excepting as to costs, the plaintiff begins.

This was an appeal from a decree of the Master of the Rolls, presented by one of the defendants, excepting as to the matter of costs.

*Baily*, for the plaintiff, proceeded to open the appeal in support of the decree.

*Campbell* objected, on behalf of the appellant, claiming the right to begin.

KNIGHT BRUCE, L. J. Can this be called an appeal from the whole decree? It is scarcely worth the discussion.

TURNER, L. J. It is by no means free from doubt.

*Baily*. The Lord Chancellor (Lord Cottenham) so ruled in the case of *Onslow v. Wallis*, 13 Jur. 1085, which was an appeal from a decree, excepting as to costs; and his lordship, on the objection being taken by the appellants, that as the appeal did not ask to disturb the decree as to costs, it was not an appeal from the whole decree, directed the plaintiff to begin.

KNIGHT BRUCE, L. J. It appears from that case that there is a rule of practice; and as that is so, it is to be followed, and the plaintiff will begin.

*Palmer, Glasse, Grove, Baggallay, Jones, and Riddell*, were the other counsel in the case.

Freeman v. Freeman.

## FREEMAN v. FREEMAN.

July 19 and 24, 1854.

*Will — Copyhold — Reversion — Surrender — Revocation.*

A testator entitled in reversion to copyhold hereditaments and in possession to freehold hereditaments, by his will devised and bequeathed all the freehold, leasehold, and copyhold estates devised by the will of his late father and also all his estates, freehold, leasehold, or copyhold, to his wife for her life or widowhood; and after her decease or second marriage he devised the same to A, B, and C, three of his children, their heirs, executors, administrators, and assigns, forever. By a later will, which commenced with the words: "This is my last will and testament," the testator gave the whole of his real and personal estate to his wife for life, and after her decease he gave all his property, personal estate, and effects to all his children equally, except his eldest son: —

*Held*, that the second will did not revoke the devise of the copyhold estate contained in the first will.

THIS was an appeal from a decision of Vice-Chancellor Wood. Thomas Freeman, at the time of making his will, in 1804, was entitled to the reversion of copyhold hereditaments, held of the manor of Bromyard, and to freehold hereditaments in possession. By his will, dated the 18th of June, 1804, he directed the payment of his debts, funeral and testamentary expenses, and charged the same on his estate and effects; and then, after saying that his eldest son, Edward Bellingham, was well provided for, the will proceeded as follows: "I give, devise, and bequeathe unto my wife, Elizabeth Freeman, for her life, in case she shall not marry again, subject as herein-after mentioned, all the estate, right, title, and interest which I have of, in, or to all and every of the freehold, leasehold, and copyhold estates given and devised, by the will of my late father, to my brother, Edward Freeman, with remainder or reversion to the right heirs of my said late father in default or failure of issue of my said brother, Edward; and, also, all and every other estate and estates whatsoever and wheresoever, freehold, leasehold, or copyhold, and to which I have any right or title whatsoever, in possession, reversion, remainder, or expectancy, to hold to my said wife and her assigns, for her life, subject to, and I do hereby subject and charge the said premises, and every part thereof, so as aforesaid given to my said wife, with the breeding-up, maintaining, and educating of my two younger sons, Thomas Dew Freeman and John Freeman, and my daughter, Eliza Freeman; and from and immediately after the decease, or second marriage of my said wife, which shall first happen, I give, devise, and bequeathe all the aforesaid messuages, tenements, lands, estates, and premises unto my said two younger sons, Thomas Dew Freeman and John Freeman, and my daughter, Eliza Freeman, their heirs, executors, administrators, and assigns forever."

The testator afterwards made another will, dated the 25th of August, 1807, in the following not very intelligible words: "This is the last will and testament of me, Thomas Freeman, of the White-house, in the parish of Suckley, and county of Worcester, gentleman.

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Whereas, in and by the will of my late father, Thomas Freeman, deceased, my eldest son, Edward Bellingham Freeman, will become, upon my decease, entitled to all my freehold estates, which will make an ample provision for him; now, I do hereby give and bequeathe to my wife, Elizabeth Freeman, for and during the term of her natural life, all and singular the stock, crop, and effects, both real and personal estates, of what nature or kind soever; and from and after her decease, I leave and bequeathe all my crop, property, personal estate, and effects, of what nature or kind soever; and from and after her decease, I do give and bequeathe all and every my child or children, (except the said Edward Bellingham,) who shall or may be living at the time of my decease, to be equally divided between them, share and share alike. And I make, nominate, declare, and appoint my wife sole executrix of this my will. In witness whereof, I have hereunto set my hand and seal the 25th of August, 1807.

"THOMAS FREEMAN."

The testator died in September, 1807. There had not been any surrender of the copyholds to the use of his will. There was no custom of the manor as to the surrender of the reversionary interests in copyholds. The testator left his widow and Edward Bellingham Freeman, his eldest son and heir at law, and heir according to the custom of the manor of Bromyard, and the three younger children mentioned in the first will, Thomas Dew Freeman, John Freeman, and Eliza Freeman, surviving. He also left two other children, born after the date of the first will, Louisa Freeman and Mary Ann Freeman. The testator's widow died in 1827, and in October, 1851, Edward Freeman, the tenant for life of the copyholds, died, when the reversion of the copyhold hereditaments fell into possession, and thereupon, Edward Bellingham Freeman brought an action of ejectment for the recovery of them. To restrain this action, and to have the want of a surrender to the use of the will supplied, were the purposes for which the suit was instituted. The plaintiffs to the bill, as amended, were: Thomas Dew Freeman, the real representative of John Freeman, (who had died,) and Eliza Freeman, the three devisees of the will of 1804; and the defendants were the real representatives of Edward Bellingham Freeman, (who had also died,) and Louisa Freeman, and Mary Ann Freeman, the two younger children. The cause was argued before Vice-Chancellor Wood, who held<sup>1</sup> that the

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<sup>1</sup> When the case was first argued, before Vice-Chancellor Wood, it had not been ascertained whether there was any custom of the manor as to the surrender of reversionary interests in copyholds, and the parties to the suit were not the parties as finally arranged by amendment by his Honor's direction. The principal passages of his judgment delivered on the 1st of March, 1854, and reported 1 Kay, 486, were as follows: "I am prepared to state my view of this case, assuming the second will to be inoperative as to the copyholds. On the assumption that the copyholds did not pass by the second document, I should be of opinion that the second document had not revoked the first. \* \* After considering this matter a good deal, it not being by any means a clear question or easy of solution, and there being no precise authorities upon it, it strikes me in this way: all the authorities lay down this, that a will, as it is called, of

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second will did not operate to revoke the devise of the copyholds contained in the first, there being freehold property upon which the general devise contained in the second will could operate, and from that decree the customary heir appealed.

copyholds, is in truth no will at all, it is a mere appointment or direction how the copyhold property should go, which has been surrendered to the uses of the will. That is laid down in several authorities, but most particularly in the case of *Brodie v. Barry*, 2 Ves. & B. 127. The learned judge there, in speaking of Scotch estates, compares it to the case of a devise of copyholds, which, he says, in effect is merely an appointment of the use of the copyholds; and in *Carey v. Askew*, 2 Bro. C. C. 58, it was held, that a will wholly unattested was good to declare such uses. Looking at the question in that point of view, I have considered the analogy of appointments, and I can find no case upon the subject. But upon principle, if there were power to appoint by will, and if an appointment were made by a will which was a good appointment, referring to the power and giving the property and containing other devises, and if subsequently there were another will declared to be the party's will, giving all his real estate and not revoking any previous instrument, I think it would be extremely difficult to hold that the actual appointment made by the first will was in effect revoked. The argument upon it would be, that the testator calls the latter will his "last will," and affects by that to dispose of the whole of his property; and that, therefore, he may be assumed to be giving a testamentary direction for all that he wished to be done after his death, but not having mentioned again that which he had mentioned in a former instrument, and not having again made an appointment, it would be urged, that he purposely omitted that for which he had given precise directions in a former instrument, and meant to die without exercising the power. Still, I think it would be very strong to hold that, with reference to an instrument which is affecting only to dispose of all that is his own. I cannot decide, because he had disposed of all that was his own, and omitted to do that which he had done in a former instrument, namely, to dispose of that which was not his own, that he had in effect, though not in words, revoked his previous disposition of that which was not his own. Therefore, when the testator here made a devise by the first instrument, giving the copyholds in plain terms, he was in truth doing that which the court says, in favor of younger children, the heir shall be bound to complete; and if the second will did not pass these copyholds, upon which at this moment I say nothing, as I am only taking it for the purpose of the argument, the heir would be bound to complete the disposition by the first will in favor of those to whom the copyholds were thereby expressly devised. There is another thing to be considered. The case of *Church v. Mundy*, 12 Ves. 426; s. c. 15 Ib. 396; shows that there was a good deal of discussion upon the question of what the effect is, where a reversion in copyhold property is disposed of. That case was argued by Sir Samuel Romilly without effect before Sir William Grant at the Rolls, where the bill was dismissed altogether; but this decree was reversed by Lord Eldon. Before Sir William Grant two points were raised: First, that this being a reversion of the copyholds, there could not be a surrender to the use of the will, and, therefore, no surrender being required, there was no necessity for the distinct indication of an intention to pass the copyholds, which is made by a surrender. Sir William Grant's answer to that was: Supposing a surrender not to be requisite, it cannot be said that not doing any thing one way or the other can be expressive of any intention, and, therefore, that argument could not be of any assistance; and further, he held upon the authority of *Roe v. Avis*, 4 Term Rep. 605, that the reversion did not pass under any circumstances; and he dismissed the bill. Lord Eldon was dissatisfied with that decision, and directed an inquiry whether there was any freehold which did pass, because, if there were no freeholds he should not follow *Roe v. Avis*, but should hold that the copyholds passed by the will; and he gave attention to the point of the interest being a reversion, because he directed an inquiry whether the reversion was devisable by custom without a surrender."

The second judgment of Vice-Chancellor Wood, pronounced on the 24th of March, 1854, (after the bill had been amended, and the non-existence of any custom as to reversions had been inquired into, and after the case had been partially reargued,)

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*James and Metcalfe*, for the plaintiffs, in support of the decree of the court below. The second will does not revoke the first, excepting so far as the second is inconsistent with it; and the mere fact that the second commences with the words: "This is the last will," is of no

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reported in 1 Kay, 492, was as follows: "I considered this question a good deal on the former occasion; and now having had the benefit of an argument upon it, the opinion which I was at first inclined to form has been confirmed. I test the matter in this way. Suppose that the parties interested in the second will alone had filed this bill against the heir of the testator, I think that he would have a conclusive answer to them. There is nothing in this instrument which indicates an intention which a court of equity will recognize as passing copyhold property. I do not think that the words of the recital, that the testator's eldest son would, upon his decease, become entitled to all his freehold estates, which would make an ample provision for him, followed by a gift of all the testator's real and personal estates, enable me to hold that there is a sufficient expression of intention, from that recital alone, to pass these copyhold estates by the subsequent devise. The test is, will the persons claiming under that devise give up the freehold estate on the ground of the previous recital? If it be argued that the clear intention was, assuming Edward Bellingham Freeman to take all the freeholds, that the copyholds would pass by the general devise; then, following that argument out, the intention must have been not to pass by that general devise those freehold estates of the testator which Edward Bellingham Freeman did not, in fact, take under the father's will. In truth, it is a mistake in the recital; but there is no doubt that those freehold estates which Edward Bellingham Freeman did not take passed by this general devise; and, therefore, as there are those freehold estates upon which it can operate, it does not pass the unsurrendered copyholds. For the only ground on which the court allows general words to pass unsurrendered copyholds is, just as in cases of powers, if there is nothing else upon which the devise can operate, the copyholds pass, or the power is exercised, *ut res magis valeat quam pereat*; but if there is any thing else that can satisfy the words, the power is not exercised, nor do the copyholds pass. It is said that these two instruments must be taken together as one will; and then, as on the face of the first an intention is clearly expressed to pass copyholds by that description, the subsequent part of which must be considered the same instrument, simply modifies, in some degree, the disposition of the copyholds which was previously made. But the difficulty is, that the second instrument, giving it that sense, would be an entire alteration, and, in fact, a revocation of the interests given by the former to the testator's three children, Thomas, John, and Eliza Freeman, two fifths of which would be taken away from them and given to the testator's two other children. The second devise would be simply inconsistent with the former, and the two wills could not fairly be considered to stand together *qua* wills. The ground of my former decision was, that I considered a will to operate as a disposition of copyholds in the nature of an appointment. Sir W. Grant states it to be exactly analogous. The testator does not devise the copyholds: he declares the uses of the surrender only. In this case, the first instrument appears to me to be clearly an appointment of these uses, and the second instrument does not revoke this as against the heir or other parties. No intention is expressed of altering in any way those limitations. Following out the analogy, the case would stand thus: supposing a party having a power of appointment over estate A, and possessing also another estate B, by his will appointed estate A to go to three of his children, and gave and devised all his real estates, not using the word 'rest' or 'residue,' to his other children, no one could doubt that the two things would be consistent. If I regard these two instruments as one will, I must put that interpretation upon them. It would be inconsistent to find a devise to three of the children, and then of the same property to all five; rather than that, I must give a legal effect to the first devise of the copyholds. The testator has named the three children in the devise to them, and has only given his own real estate to all his children. The two things can stand together in that way. There is no indication of an intention to give the copyholds to the five children. That is the fallacy of the argument upon the second will. It is argued, that, because in a prior part of the instrument, or in the former will, there is evidence of intention sufficient to enable the court to supply a surrender to the uses

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importance, for the same question arose and was so decided in the case of *Thomas v. Evans*, 2 East, 488; where the judges said that such words were merely words of form, and signified no more than that the latter instrument was the last in order of time. The same case decides that two wills, or two instruments purporting to be two wills, may well stand and be interpreted together if there be property on which each can operate, and if the latter does not contain a disposition of the same property as was included in the first, inconsistent with the disposition contained in it. That is expressly stated by Lord Ellenborough, who says: "It is not enough to say, that by making this bill in terms large enough to include all his property, he must therefore have meant to revoke the former will, unless it can be shown that he has made a disposition of the same property inconsistent with it." In the present case the testator had freehold estates whereon the second will could operate, and therefore there is no necessity whatever to hold that the same will should operate upon the copyholds. The reasoning in the cases of *Church v. Mundy*, 15 Ves. 396; *Wentworth v. Cox*, 6 Madd. 363; and *Allen v. Anderson*, 5 Hare, 163, was also relied upon. *Judd v. Pratt*, 15 Ves. 390; *Byas v. Byas*, 2 Ves. sen. 164, and *Sampson v. Sampson*, 2 Ves. & B. 337, were also cited.

*Rolt and Clarke*, for the defendants, the two younger children. The words of the second will are quite sufficient to pass real estate, and therefore copyholds which had been surrendered to the use of the will, where such surrender is necessary. Had the second will been the only instrument in question, the court would have supplied, were it necessary, a surrender to its uses. As the two wills are in a great degree consistent with each other, varying the devise of the copyholds from one in favor of three younger children to one in favor of five younger children, (the exclusion of the eldest son being steadily kept in view,) in such case the court would, were it necessary, supply a surrender in favor of the objects contemplated by the second will, and therefore it will hold that the copyholds passed by the second will. That the word "property" will pass real estate is decided by *Doe d. Wall v. Langlands*, 14 East, 370; and that the two instruments may form one will, is plain from *Hitchins v. Basset*, 2 Salk. 591. The younger children ought to be included in the benefit of the devise in the second will.

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of that disposition, therefore, there being in another part, or rather in the latter will, a disposition which alone would not indicate such intention sufficiently, I am to take the indication of intention which is given by the former, and is not given by the latter, in order to supply a surrender to the uses of the latter devise. But the intention is indicated on behalf of the objects of the former gift, and not on behalf of the objects of the latter, either as against the former devisees or the testator's heir. The truth is, that these copyholds passed by the first instrument; and I am bound in law to hold, whatever may be my own opinion of the singular result of the decided cases, that the second will simply operated on that property upon which it affected to operate, and not upon the copyholds which passed by the former will."

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*Chandless*, for the customary heir, the appellant. The second instrument is plainly a substantive will, and cannot be treated as a codicil to or part of, or a continuation of the former instrument, as is clearly shown by the initiatory words: "This is the last will and testament of me." That it was intended to be a substantive will, and to be operative in lieu of any former will, is equally plain from the fact that it affects to dispose of all his real estate, and does, in fact, dispose of the whole of the testator's freehold and personal estate, the words employed being ample to include all freehold estate. That such words do create a revocation was held in *Plenty v. West*, 1 Robert. 264. That being so, the two instruments are wholly inconsistent, for, by the former, he gives all his real estate in one way, and by the latter he affects to give all his real estate in another way. The inevitable result is, that the second will being operative over the freeholds revokes the former, and as a consequence, the copyholds, there being no surrender, have not passed; and as the words of the second will do not contain any reference to copyholds, the court will not supply a surrender. It is no objection to the operation of the second will as a revocation of the first, that it does not contain any words directly declaring the intention of the testator that such should be the case. The practice is a modern invention, and has arisen from the redundancy of expression in modern conveyancing, adopted, no doubt, since lands became the general object of devise, from the commendable desire of distinctly showing the testator's intention. It appears that in the collection of wills published by Mr. Maddock, ranging from the beginning of the tenth century to the beginning of the sixteenth, there is no instance of the introduction of a clause of revocation of former wills. If a second instrument be manifestly contrary to a first, both professing to be wills, there will be a revocation of the first. *Coward v. Marshal*, Cro. Eliz. 721; and such is the case in the matter before the court. The judges held in *Seymour v. Nosworthy*, Hardres, 374, that between two wills, if the matter stand *indifferenter*, a revocation will not be suffered of a will solemnly made. But here the matter is any thing but of that nature, for the dispositions in the second instrument are essentially different from those in the first. The distinction between wills and codicils is especially remarked upon by the court in the case of *Crosbie v. Macdonald*, 4 Ves. 610; where it is observed: "There is a great distinction between wills and codicils in this respect. If there are two separate papers, both called wills, inconsistent with each other, it is not the rule to prove both in the ecclesiastical court. The last is the will. From the nature of the instrument, it revokes the other. If the last purports to be the whole will, a complete substantive will, they do not, I conceive, prove both. Unless there is something to show that it was meant to be coupled with another instrument, it is not to be taken to be a codicil." Applying this reasoning to the present case, it is plain that the second instrument is inconsistent with the first, and from its very nature revokes it, and as there is property whereon the second will can operate, namely, the freehold estate, there is a plain revocation and a new devise; and copyholds not being men-

tioned, the general expressions in the second will are not sufficient to induce the court to supply a surrender, and therefore it will be held that the copyhold hereditaments have descended upon and belong to the customary heir upon an intestacy respecting them.

The following cases were also cited: *Willet v. Sandford*, 1 Ves. Sen. 186; *Archer v. Slater*, 10 Sim. 624.

*Berkeley*, followed on the same side.

*James*, was not called upon to reply.

KNIGHT BRUCE, L. J. It is conceded in this case, on the part of both plaintiffs and defendants, that the copyhold estate in dispute is the only copyhold property which the testator had or was interested in, and that he never surrendered any copyhold property to the use of his will. It was further conceded that his customary heir was sufficiently provided for, independently of the copyhold property; and that at the date of the second of the testamentary instruments, the testator had a freehold estate in fee-simple, devisable and devised by him. The only ground on which the customary heir can claim, is on the supposition that there was an intestacy. The second will does not purport to revoke the previous will, nor does it notice it, nor does it affect any part of the testator's copyhold property. It may be true that it disposes of some of his property in a manner different from the earlier instrument; but the two instruments may well stand together, neither of them containing separately the testator's whole intentions, and the dispositions in the latter will only be superseding those in the former, so far as they were consistent with them. The fact of the testator calling the second will his "last will," makes no difference, so far as it is a will of real estate. It is, in fact, the same as if the testator, instead of "this is my last will," had said, "this is a testamentary instrument," and if instead of "the sole executrix of this my will," he had said "my sole executrix." If the testator had used the expression, "this is my sole will," there might have been a difference; but I do not think that, when the testator calls the instrument "his last will," he is to be taken, *prima facie*, to mean that it is to revoke all other wills, not clearly inconsistent with it.

TURNER, L. J. The only question here is, whether there is an intestacy. No case has been cited where, a distinct property having been given by a first will, the disposition of it has been affected by a will which does not make any allusion to it. I am not disposed to extend the principle of the decisions so as to create an intestacy. I do not mean that a subsequent will cannot revoke an earlier one, if there is an apparent intention to that effect. But here the testator disposed of the property by the first will, and did not dispose of it by the second, which is no sufficient evidence of intention. Then, it is said that the law of the ecclesiastical courts is different; but there are reasons why those courts should take a different view of the subject, inasmuch as they regard the appointment of the executor as

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the point of chief importance in a will. With respect to the costs, we think that the Vice-Chancellor has dealt mercifully with the appellant in not making him pay the costs, and he ought to be well satisfied. He must pay the costs of the appeal.

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SHERWIN v. SHAKSPEARE.

June 15, and July 15, 1854.

*Vendor and Purchaser — Special Conditions — Interest on Purchase-Money — Account of Rents — Wilful Default — Allowance for Repairs — Income Tax — Form of Decree.*

Where there is a condition of sale, that "if from any cause whatever" the purchase shall not be completed by a certain day, the purchaser shall pay interest, and delay take place which is occasioned by the state of the title, and is not wilful, the purchaser is not discharged from the payment of interest; but where the first abstract was not a complete abstract, the court gave interest only from the same period after the complete abstract was delivered as was equal in duration to the time which, by the contract, was allowed to elapse between the delivery of the abstract and the day wherefrom interest was to be paid.

In a suit for specific performance, instituted by a vendor, who has remained in possession, it is unusual and improper (unless in a special case) in decreeing specific performance to direct in the account of rents and profits that the vendor shall be charged with rents and profits which, but for wilful default, he might have received. In such a decree it is irregular, excepting upon a special case, to direct the allowance to the vendor for expenses of lasting repairs, or of income tax in respect of such part of the property for which the vendor is charged an occupation rent.

The forms of decrees of the court (which are the best exponents of the law, have long existed, and have worked through all difficulties and proved effectual for the purposes of justice,) ought not to be departed from, or added to, or altered, unless in cases of special necessity.

THIS was an appeal from a decree of the Master of the Rolls, in a case reported 23 Eng. Rep. 199. The only facts necessary to be adverted to, in addition to those there stated, are, the eleventh condition of sale, which is set forth at length in the judgment of Lord Justice Knight Bruce, the points of allowance of occupation rent, and of income tax, and some particulars of correspondence referred to in the judgment of both the lord justices. The decree at the rolls, as before appears, contained a direction that, in taking the accounts, the vendors should be charged with rents and profits which, but for their wilful default, they might have received, but that they should be allowed for all needful repairs, and for the income tax in respect of that part of the property occupied by them. The plaintiffs appealed from this decree; but upon the matter coming on upon the appeal, and it appearing that the defendants, although they had not appealed, were dissatisfied, the lords justices, in order to save the expense of an additional petition of appeal, permitted, at the request of all parties, the whole decree to be opened. The arguments and cases are fully set out in the former report, so far as the points were discussed at the rolls.

The following authorities were also referred to on the appeal: *Murray v. Palmer*, 2 Sch. & Lef. 474, 488; *Acland v. Gaisford*, 2 Madd. 28; *Foster v. Deacon*, 3 Ibid. 394; *Wilson v. Clapham*, 1 J. & W. 36; *Dakin v. Cope*, 2 Russ. 170; *Howell v. Howell*, 2 M. & Cr. 478; *Blennerhasset v. M'Namara*, 1 Moll. 81; *Holroyd v. Wyatt*, 1 De Gex & Sm. 125; Seton on Decrees, 2d edit. 250; Statutes 5 & 6 Vict. c. 35, s. 102, and 16 & 17 Vict. c. 34, s. 40.

*Lloyd and Bird*, for the plaintiffs.

*Palmer and Cairns*, for the defendant.

July 15. KNIGHT BRUCE, L. J. In this case of *Sherwin v. Shakspeare*, all the considerations properly belonging to a case where there has been vexatious conduct, or gross delay, or unfair dealing on the part of the vendor, appear to me without the dispute; for whatever may be thought of the manner of proceeding that was adopted by the purchaser or his agent, or both of them, (and the agent being dead, I am rather unwilling than willing to enter into a close examination of some portion of the conduct on that side of the litigation,) there has been, in my opinion, no such case established against the vendors. In the case of a considerable purchase of land in this country, considering the nature of the titles to land according to our institutions and to the present course of practice, it is not reasonably to be expected that, at the time appointed for the delivery of the abstract, an abstract shall be delivered at once, clear of all difficulty, of all doubt, or even of all objection. Such a case has, perhaps, never, certainly but very seldom, occurred; and my conception of the rule, applicable to a case of that description, and, perhaps, I might say of this description, is, I find, correctly expressed by Sir E. Sugden, in his smaller treatise on the Law of Vendors and Purchasers, p. 496, where he says: "But where the delay is occasioned by the state of the title and is not wilful, that seems to fall within the provision of 'any cause whatsoever.'" The learned author afterwards proceeds to qualify that, or to add a degree of hesitation to the proposition, arising from some authorities which he mentions. I, however, speaking for myself, agree in the proposition as there stated, without any qualification whatever. I am speaking only of the case of a contract where the provision is, that interest shall be paid in case of delay arising from any cause whatever, without restriction or qualification, as in the present case. The fifth condition is: "If, from any cause whatever, the purchase shall not be completed on the 25th day of April next, the purchaser shall pay interest, after the rate of 4l. per cent. per annum, on his purchase-money, from that day until the completion of the purchase." Now, we must remember that that is to be found in a contract which contemplates the possibility, and, perhaps, it would not be too strong to say the probability, of a defective abstract being delivered, because the seventh condition says: "The vendors will, at their own expense, deduce a good title to the premises sold according to these conditions of sale, and deliver an

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abstract of title, within two months, to the purchaser or his solicitor, upon application being made by them." Now, upon the construction of that sentence, I apprehend that the phrase, "within two months," applies to the delivery of the abstract, and cannot, upon any reasonable interpretation consistent with grammar or the idiom of the English language, be applied to the deduction of the title. The structure of the sentence, in my opinion, forbids it. It then goes on: "And, within six weeks from the delivery of the abstract, all objections to the title shall be stated, in writing, and delivered at the office of the vendors' solicitor, in default of which the title shall be considered as accepted; and, in case the purchaser shall raise objections to the title, the vendors shall have the option of removing the objections or rescinding the contract." It is obvious, therefore, that the parties to the contract contemplated the possibility of a title, imperfect at first, or an abstract originally defective. It does not end there; for the eleventh condition is: "If any error or mismeasurement shall be discovered in the plan, particulars, or otherwise, the same shall not annul the sale, but a fair compensation or equivalent, according to the quality of the land, and the average of the whole purchase-money, shall be given or taken, as the case may require, and shall be settled by two referees, or their umpire, one referee to be named, in writing, by each party within seven days after he shall have been required to do so by the other party, and, in case of default, the other party may make the nomination; the referees shall appoint an umpire before they proceed to business, and the decision of the umpire shall be final. And if there shall be any parts of the estate (not exceeding a twentieth part of the whole) to which a title cannot be made according to these conditions, such deficiency of title shall not annul the sale as to the remainder, but the purchaser shall be at liberty to refuse such part or parts if he shall think proper, and in that case, the deduction to be made from the purchase-money, shall be settled in like manner by two referees or an umpire." Under this contract, therefore, I am of opinion that the mere circumstance that the abstract delivered was defective, or (which is stating a case of less difficulty) not supported by the evidence required to support it, would not be sufficient under a contract such as this, to exempt the purchaser from paying interest under the fifth condition of sale, the title and purchase being afterwards completed. Again, I say, to prevent the possibility of misapprehension, that I certainly exclude from every remark that I have made and shall make in this present judgment altogether the case of vexatious conduct, of dealing in bad faith, and of gross negligence on the part of the vendors, there being, in my opinion, (whatever may be said of the purchaser,) no such case applicable to the vendors here. These observations might, *prima facie*, seem to lead to charging the purchaser with interest from the 25th of April, which is the day mentioned in the contract. There are, however, some peculiarities belonging to the present dispute.

The contract originally signed was dated the 30th of November, 1843, and I believe signed on that day. That provided, that, in addition to the purchase-money, the timber should be valued. The par-

ties, however, changed their minds afterwards, and a contract was substituted for that signed as well as dated on the 30th of November. The substituted contract continued to bear the date of the 30th of November, as the original contract had done, but was in fact not signed until the 10th of February, varying the terms of the agreement only by striking out the valuation of the timber, and increasing the purchase-money by an agreed sum, I suppose at which the timber was directed to be taken. Singularly enough, whether through oversight or otherwise, the date of the 25th of April remained the same, though bearing, it is obvious, a very different relation to the contract signed on the 10th of February from that which it bore, or would have borne, to the contract signed on the 30th of November previous. The peculiarities of this case, however, do not end there, for I find an abstract was delivered, or abstracts were delivered in March, which do not purport to extend to the whole estate; therefore, there was no abstract delivered with respect to the entire property. No observation need here be made, except in passing, upon the circumstance that the deeds relating to part of the property were in the possession of the purchaser's solicitor, who was concerned for the mortgagees of the estate or parts of it. He agreed to supply that defect, and did so in a sense and in a manner. It appears that to a portion of the estate, consisting of more than seven and less than eight acres, that state of circumstances does not apply, and it seems that as to so much of the estate as to which the purchaser had a right to judge for himself before he would treat it as a defective title, he had a right to require the vendor to exhaust all his means of giving a title before having recourse to the eleventh condition of sale, and it was, therefore, notwithstanding the smallness of the quantity, the comparative smallness of the quantity, or the relative smallness of the quantity, no more than the purchaser had a right to require, to insist that the abstract should be delivered of that portion. The abstract of that portion was not delivered until some time in November, 1844. As the particular day does not appear, so far as I am aware, I must take it, against the vendors, to have been on the last day of that month. Now, at that time it appears to me, and I believe to my learned brother also, that the vendors' conduct, as I have already said, was neither vexatious nor wanting in good faith, nor censurably dilatory in all that could be requisite to entitle them to interest according to the conditions of sale. Without entering into observations which might not unreasonably be entered into as to the line of conduct pursued by the purchaser, it may be sufficient to say of it (in gentle terms) that no portion brought under our attention seems to deserve commendation, or to be fit to be held out as an example. I have already noticed, however, the different relation which the 25th of April bore to the contract signed on the 10th of February, from that which it bore to a contract signed on the 30th of November; and it appears to me, therefore, giving effect to that circumstance, that the just mode of dealing with the case in point of interest, in the peculiar position in which the present affair stands, will be to charge the purchaser with interest from the 1st of March, 1845. That, I think, will

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be a very fair analogy in the particular circumstances of the case, and a very just date to fix. Accordingly, in my opinion, and, I have reason to believe, in that of my learned brother, the 1st of March, 1845, will be substituted throughout this decree for the 31st of July, 1847; whenever the date of the 31st of July occurs, the date of the 1st of March will be substituted. That, I believe, will give effect to our intention in that respect.

The next question in point of importance is, the insertion of the expression, "wilful default," in the decree. This point, I may say, was not argued at the rolls. The learned judge had not the benefit of a full discussion upon the subject. It seems to have been taken for granted at the bar that, in the case of a vendor remaining in possession during the discussions upon a title in which he, the vendor, has not been in fault—because, I repeat, that the mere circumstance, that in a considerable purchase the title is not complete at the day, is not a default on the part of the vendor, within the meaning of the expression that is contained in the conditions, with reference to this subject—it seems, I say, to have been taken for granted, that the vendor remaining in possession, under such circumstances, was to be treated as a mortgagee in possession. I have never heard that rule laid down, nor do I believe that it is consistent with the rules or practice of the court, so to deal with it. There is an analogy between this case and that of a mortgagee in possession, but a very imperfect analogy. There may also be an analogy between his case and that of a trustee, but that is also a very imperfect analogy. In the case of a trustee, we know that a special case must be made before you can charge him; in the case of a mortgagee, it is a matter that no special case is required. My impression, from the course of the court, as far as I have been acquainted with it, and the forms of the court, which have a great tendency to show what the rule of the court is and upon principle, is, that a special case ought to be made for the purpose of inserting those words in a decree for specific performance, where the vendor has been in possession, during a time in which he is to account for the rents. Now, here there is no such special case necessary. One was attempted to be made by an affidavit or affidavits,—made, I think, by the purchaser himself, and met by an affidavit on the part of the agent of the vendors, which subsequently removed it. It appears there is no evidence whatever that the vendors have not, in every respect, properly managed and dealt with the property; and therefore, I cannot assent to placing the words in a decree, for specific performance, under such circumstances, where it cannot be right, unless it is a matter of course, that they should be there; and I repeat that, according to my experience of the court, my knowledge of its forms and rules, and my conception of its principles, it ought not, as a matter of course, to be there. There are two or three minor matters upon this decree, which require notice. One is, that in fixing the occupation rent to be paid for part of the property, a reference is made, in so many words, to an allowance of income tax. It appears to me, that that is not according to the forms and rules of the court. It may possibly be very right that

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the allowance should be made — possibly, those who have to pay the occupation rent will be allowed it; but however that may be, I think that the particular expression has no place in the decree. There is another instance where the decree appears to me to differ from what is usual, and which I am accustomed to regard as the form of the court, namely, that it directs, in so many words, an account of repairs, lasting repairs, made by the vendors, while remaining in possession. Now, upon a special case made for the purpose, that might be very right. I can conceive a case, in which it would be absolutely indispensable to justice, to do so. But no special case is made for the purpose; and I do not believe it belongs to the forms of the court, which are among the best evidences, (as I have already said, and as we all know, and as has been said by judges of the highest authority,) the best exponents, as good exponents as well can be, of what the law is. It is very possible, as I have said with regard to the income tax, that this allowance for repairs may be brought under the head of just allowances, or in the manner of taking the account. But however that may be, I think they have no place in the present decree, without prejudicing any question at all, as to the propriety, or not, of allowing them in some manner. Here I think they cannot be. Another point that may deserve attention in going through the decree is, as to fixing the times during which the account of occupation rent, and otherwise, are to be taken. It seems to me that greater precision of expression, with regard to time, may be found useful in that respect. I think I have now gone over all those portions of the decree upon which it is necessary to make any observation, except with regard to the costs; and as to those points upon which I have made remarks, I must say that the case is much more in the matter of an original hearing, than an appeal. I cannot help thinking it probable, in a very high degree, that if the learned judge, before whom this case was heard, had had the benefit of the full argument we have had on the subject, his conclusion would have agreed with ours. With regard to the costs, the Master of the Rolls ordered the defendant to pay all the costs of the suit, up to the hearing of the cause inclusive; and I think that there never was a direction more consistent with justice, in every sense in which that word can be used. I restrain myself, as I have already stated that I should endeavor to do, from entering into any more minute remarks on the subject, seeing that the agent of the purchaser is dead. Were he here, the case might be better. Beyond all possibility of question, the costs were correctly given, by the Master of the Rolls, when he directed the purchaser to pay them. With respect to the costs of the present appeal, it has been so peculiarly circumstanced, in more than one respect, and the decree has been varied, partly in favor of one and partly in favor of the other, and in the particular circumstances I have mentioned, combined also with the circumstance that the petition of appeal presented by the vendors raised one question specifically, which was abandoned at the bar, that I think I ought not to give way to the strong inclination that I feel, to make the purchaser pay the costs of the appeal also. I fear that each party must bear his own costs of this appeal.

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TURNER, L. J. The solicitor who was concerned for the purchaser in this case, being dead, I abstain from making any observations upon the course of conduct which has been pursued with reference to the completion of this purchase, upon a contract entered into in the year 1843, and becoming the subject of litigation, after renewed attempts at an arrangement, in the year 1852. With reference to the questions in this case, which are mere matters of form, and in which I fully concur with my learned brother,—I mean those questions as to allowing to remain in this decree the words, “after deducting income tax,” and the direction for an account of the moneys laid out in necessary repairs,—with reference to those questions, I most fully concur that they must be struck out of this decree. It is to my mind a matter of very great importance, that the decrees of this court should not be loaded with unnecessary references. They have been framed and have existed for years, for centuries, and have been worked through all the difficulties which beset the working out of decrees of this nature. They have always proved effectual for the purpose for which they were intended; and in my opinion, nothing more detrimental to the practice, or I may say to the law, of this court, can be introduced than the habit of adding to and altering the decrees, which of themselves are effectual to work out the purposes of justice. I think, therefore, that the words “after deducting income tax,” and the direction for the account of the moneys laid out in necessary repairs, there being no special case made for either of these purposes, must be struck out. The only other question in the case here, is, from what time interest is to run upon the purchase-money, as against the purchaser, and whether the vendors, in the account of repairs to be taken against them, are to be charged with wilful default. Now, as to the first of those questions, the contract is expressed in terms that, if, from any cause whatever, the purchase shall not be completed on the 25th of April next, the purchaser shall pay interest at the rate of 4*l*. per cent. per annum, upon his purchase-money.

The argument, on the part of the defendant, the purchaser, is this, that that contract proceeds on the hypothesis that the vendors have performed their part of the contract in completing the title to the property; and, to some extent, I concur in that position. I concur only to this extent, that undoubtedly it is incumbent on the vendors to show that they have a title to the estate by the abstract which they deliver; but I dissent from the defendant's argument to this extent, that it is incumbent on the vendors before they can claim interest under that contract to show that the whole transaction of the purchase has been carried through to that extent, that the transaction is in a position in which it admits of immediate completion. I take it, that when a vendor has shown a perfect title upon his abstract, it must be presumed that the purchase-money would become payable by the purchaser. And with reference to the present case, it seems to me that there is a distinction in it from all that I have seen before, in this circumstance, that from the very earliest period of this transaction, I think as early as the month of August, 1844, the ab-

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abstract having been delivered on the 1st of March, 1844, to the great bulk of the property, to all the property except about seven acres, which it is admitted were not material to the enjoyment of the estate, — the abstract having been, I say, delivered on the 1st of March, 1844, the opinion of the purchaser's counsel on that abstract was given on the 7th of August, 1844, and on the 9th of August, 1844, the purchaser writes that he is desirous of being put into communication with Christ's College, from whom a lease, which formed part of the subject of sale, was held, and with whom it was necessary he should treat for the purpose of renewing that lease. And on the 29th of August, 1844, he again writes to the solicitor of the vendors stating his intention to complete the purchase, and asks for the liberty of sporting on the estate. As early, therefore, as the month of August, 1844, this purchaser was satisfied that the contract into which he had entered was a contract which was capable of performance and would be ultimately performed. And if any purchaser indicates from the period I have mentioned his intention to complete the contract, it seems to me that the necessary consequence of that communication of opinion on his part is, that all the terms of that contract must apply to what is to be done between the parties. If he had said: "I intend to complete that contract," it is an intention on his part to complete according to the terms which he has entered into; and, therefore, it seems to me that, apart from all the decisions which have occurred upon this subject, there is a specialty in this case which sufficiently shows that throughout these transactions the purchaser considered that this was a contract which was to be carried into effect by him, and must, therefore, be carried into effect according to the terms which have been entered into between the parties. Well now, it is true that at the time a perfect abstract of the title had not been delivered, but that the abstract of title which remained to be delivered was an abstract only relating to the seven acres of the property which were not material to the enjoyment of the estate — the record admits that to be the case. To those seven acres a further abstract was delivered on the 9th of November, 1844, and upon the further abstract an opinion was given by the purchaser's solicitor on the 11th of June, 1845. Now, I have read with great care, and I may say, also with great pain, the whole of the statements contained in this bill, and which seem to me to be admitted on this answer, and from that period I confess I do not find on this record any thing to show that there was any objection to title remaining to be raised on the part of the purchaser. It is true that in the month, I think, of August, there was discovered a deed, and the purchaser himself, or his solicitor, delivered to the defendants' solicitor an abstract of such deed which created a charge on this estate of portions to the amount of 1,800*l*. The consequence of that charge of portions existing upon the estate was this, either there was some fund, whatever it would be, applicable to the payment of those portions or there was not. If the party who had created the charge of portions had mortgaged the estate and conveyed it away to the purchaser for valuable consideration without

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notice, the charge created by those portions could not prevail against those mortgagees, and if, therefore, the purchase-money did not extend to pay the mortgagees, there was no fund. But if there was a fund beyond what would be sufficient to pay the mortgagees, the result that seems to me to follow, would be this, that the purchaser would have a right — not to object to the title — but to insist that the amount of the charge created by the deed of January, 1808, which charged the portions, should be retained out of the purchase-money and devoted to the payment of those portions unless a release was produced or an indemnity was given. The arrangement that these parties made was that, instead of dealing with the case on that footing, they agreed that the indemnity should be given in respect of those portions which was ultimately settled at the collecting of the counsel of the parties in the month of July or August, 1847. The existence, therefore, of the charge of these portions seems to me to furnish no cause whatever of objection to the title on the part of the purchaser. There had been a perfect title shown by the abstract according to all the opinion I can form on this record, no doubt requiring to be perfected before the transaction could be completed, by the necessary evidence being produced to verify it, — there had been a complete title shown as early as the month of November, 1844. From that time it seems to me that, allowing a period for the completion of the purchase from the delivery of that abstract, similar to the period which was allowed by the original agreement from the delivery of the original abstract to the completion of the purchase, from the time when the purchase ought to have been completed according to the new abstract of November, 1844, this purchaser must be charged with interest.

The other question is, whether the vendors remaining in possession of the estate are to be charged with wilful default. The ordinary forms of the court certainly, as far as I am aware of them, contain no such direction. It is very well known that there is a vast distinction between the position of a vendor and that of a mortgagee who enters into possession of the estate. The mortgagee, when he enters, enters under a condition imposed on him by this court, of exercising the utmost diligence for the benefit of himself and the mortgagor; but in the case of a vendor, the vendor remains in possession of the estate. It may ultimately appear that the estate of which he is in possession may never become the estate of the purchaser at all, and, therefore, I think that if he continues in the due and ordinary course of management, it is not the course of this court to charge him upon the principle of his having been converted into the position of a mere mortgagee for the purchase-money, until it be ascertained whether that relation can or cannot subsist between the parties. It seems to me, therefore, that the direction which is contained in the decree must be struck out. But it is said, that there is a special case in the present instance, which, although it might not justify the decree in charging the vendors with wilful default, would justify an inquiry on the subject, because it appears that the vendors whilst in possession reduced the rents of the property. It does not seem to

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me, upon the evidence before us, that there is any case for directing that inquiry. It seems that the same reduction of rents was made by the owners of other property in the neighborhood. It appears, and is stated, that the reduction of the rents was necessary. There is nothing whatever to show that that reduction of rents was not made in the ordinary course of management by a prudent owner of the estate; and unless the vendors are chargeable, as upon the principle of wilful default, it seems to me that if they have done that which a prudent owner of the estate is bound to do, they ought not to be charged with any inquiry on the subject. My opinion, therefore, entirely agrees with that of my learned brother, that the interest must run from the 1st of March, 1845, which is about three months from the period when the second abstract as to the seven acres must be taken to have been delivered, and that the charge of wilful default must be struck out of the decree, and also the direction as to the income tax, and as to the necessary allowance.

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THE MAYOR, ALDERMEN, AND BURGESSES OF FAVERSHAM v. RYDER.

June 15 and 26, 1854.

*Charity — Mortmain. — Gift for the Benefit and Ornament of a Town.*

By his will, a testator gave a reversionary interest in personal estate to the mayor, jurats, and commonalty of the town of F, to be applied by them in such manner and for such purposes as they should judge to be most for the benefit and ornament of the town: —

*Held*, upon appeal, affirming a decree of the Master of the Rolls, that this was a good charitable gift, although the discretion given to the trustees might extend to an application of the fund in violation of the statute 9 Geo. 2, c. 36, (the Mortmain Act,) the presumption being that where trustees of a testamentary gift for charitable purposes have, by the terms of the gift, a discretion to apply the benefit of the gift either in a way which the law allows or which the law disallows, they will act in a lawful manner.

This was an appeal from a decree of the Master of the Rolls, establishing a charity gift under the following circumstances: Thomas Romsey made his will, dated the 15th of September, 1798, and thereby gave and bequeathed partly as follows: "Whereas I am entitled to the capital sums of 1,000*l.* 4*l.* per cent. bank annuities and 2,000*l.* 3*l.* per cent. consolidated bank annuities, subject to the life-interest therein of William Wightman, the husband of my late daughter Amelia Wightman, deceased. Now, I do hereby give and bequeathe the same from and immediately after the death of the said W. Wightman unto the aforesaid W. Suckling, Esq. and John Ireland Rawlingson, and to the survivor of them, and the executors and administrators of such survivor, upon trust to permit and suffer my daughter Harriet Goodwin, if then living, to receive and take the interest and dividends thereof during the term of her natural life, and

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from and after her decease, or in case she shall die in the lifetime of the said W. Wightman, upon trust to permit and suffer my daughters Mary Suckling and Elizabeth Romsey, or either of them, if then living, to receive and take the dividends and interest thereof, as joint-tenants, during the term of their natural lives; and from and after the decease of the survivor of them, my said daughters, or in case all of them shall happen to depart this life in the lifetime of the said W. Wightman, upon trust to transfer the said 1,000*l.* 4*l.* per cent. bank annuities unto the mayor and jurats of the town of Faversham, in the county of Kent, being the place of my nativity, to whom I give the said 1,000*l.* 4*l.* per cent. bank annuities. My original intention was, that the same should have been applied towards the erection of a tower or steeple of the parish church there; but having been anticipated in that design by a late bequest, which is now carrying into execution, my desire therefore is, that the same may be applied in such manner and for such purposes as the said corporation shall judge to be most for the benefit and ornament of the said town."

The testator died in 1798. One only of his daughters survived W. Wightman, and she received the dividends during her life. Both the trustees had died, and the Rev. Mr. Ryder was the personal representative of the survivor. Long after the death of the testator's last surviving daughter, in 1833, the corporation of Faversham called upon Mr. Ryder to transfer the 1,000*l.* 4*l.* per cent. bank annuities, and upon his refusal filed, in 1852, the present bill. The Master of the Rolls, at the hearing of the cause, made a decree in the plaintiffs' favor, observing "that it was clear that the word 'benefit' might include any thing, and was not at all strictly relating to any thing in mortmain; and that it did not appear that the ornament of the town was a purpose necessarily involving the continuing land in mortmain, and that on that ground he thought the gift could not be held to be void; for to hold that it was, would be in effect to decide that every legacy is void, the trustees of which may, in the exercise of the discretion given to them, think proper to buy land without regard to the statute of mortmain; that such a decision would be inconsistent with his own judgment in the case of *Trye v. The Corporation of Gloucester*, 14 Beav. 173; s. c. 6. Eng. Rep. 73; and that he was strongly disposed to confirm the view he had there taken of the decisions and the law upon the subject." His Honor then observed, that a difficulty presented itself by reason of the Attorney-General not being a party to the suit, but added, "that if the plaintiffs consented to a scheme being settled before him (the Master of the Rolls) in chambers, he would dispense with the necessity of making the Attorney-General formally a party to the suit. This was acceded to by the plaintiffs, and his Honor ordered the fund to be paid into court, and directed a scheme to be settled for its application. From this decree the defendant appealed.

*Palmer and Clarke* supported the decree of the court below. This gift is a good charitable donation, and in no degree violates the provisions of the Mortmain Act. The point is, in fact, concluded by

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authority; for in *Grimmett v. Grimmett*, Ambl. 210, it was held, that where there is a discretion to lay out money, and which, therefore, does not involve the necessity of violating the statute, the gift is good. The same was held in *Sorresby v. Hollins*, 9 Mod. 221. In this case there is nothing in the will to prevent the trustees from laying out the money in the erection of buildings upon land already devoted to the purposes of mortmain, such as upon a parish church or upon buildings for the municipal use of the town, which purposes are plainly not illegal under the statute 6 Geo. II. c. 36. *The Attorney-General v. Bowles*, 2 Ves. sen. 547; s. c. 3 Atk. 806. In point of fact, there is no necessity whatever that the trustees should, in the due performance of the trust, either acquire land already in mortmain, or endeavor to draw land into that state; and where it is clear that the terms of a gift do not require an investment in land, the gift is good; and if there be an option to employ money in a way not obnoxious to the prohibition of the statute, the gift is good, although the actual terms of the gift authorize its illegal application. *Grafton v. Frith*, 15 Jurist, 737; s. c. 5 Eng. Rep. 201. All the cases were considered, and are collected in *Trye v. The Corporation of Gloucester*.

*Lloyd*, for the appeal. From the subject-matter of this gift, and from the terms in which it is bestowed, the only rational presumption is, that it was intended to confer a substantial benefit upon the town, the place of the testator's birth, and to be of a permanent nature, and *primâ facie*, therefore, the trust was one for which the acquisition of land was required. *Giblett v. Hobson*, 3 Myl. & K. 517. When the testator made his will he was disposing of a reversionary interest, and he himself interposed some life-interests, giving the plaintiffs a still more remote reversion; and from this it is impossible not to see that he did not mean the benefits of his gift to belong to any inhabitants of Faversham at any particular time, but intended that the inhabitants *in perpetuo* should enjoy the bounty he conferred, and as he intended the inhabitants throughout all time to participate in this benefit, the only intelligible inference is, that a purchase of land was intended. If that be so, and if it be clear that the acquisition of land already in mortmain is not expressly pointed out, it is equally plain that the gift is void as being obnoxious to the Statute of Mortmain. *The Attorney-General v. Parsons*, 8 Ves. 186; *The Attorney-General v. Davies*, 9 Ibid. 535; and *Giblett v. Hobson*, before cited. *Mather v. Scott*, 2 Keen, 172; *Edwards v. Hall*, 17 Jurist, 593; s. c. 21 Eng. Rep. 525; and *Longstaff v. Rennison*, 1 Drew. 28; s. c. 11 Eng. Rep. 267. The old decisions, as to the Mortmain Act, are not to be relied upon, and although the tendency of late decisions may have been, so far as the description of property which may be given to charitable purposes is concerned, to give a more liberal construction to the statute, yet the case now before the court depends upon what was the intention of the testator, and what he really meant, than strictly what mode can be discovered for the application of the money so as not to violate the law. What the testator intended was a permanent benefit, and the most obvious mode of conferring a permanent

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benefit is by the investment of the money in land, and that must be considered to have been his intention: from which it follows, that the gift is void. To say that he has pointed to an outlay in buildings on land already in mortmain would be almost absurd, for he could never have intended his money to pass, as it then would, from the management and control of his own trustees to the management of strangers.

*Grove*, on the same side. Much reliance seems to be placed on the fact, that it may be assumed that the testator gave his trustees a discretion as to the mode of laying out the money; but were the court to hold that where trustees have a discretion to lay out money in land, or in a manner which is legal, the gift is valid, the effect of such a decision would be to make the effectual operation of the Statute of Mortmain to depend upon the vigilance of the residuary legatee, or next of kin of every testator, in keeping trustees having such a discretion to the exercise of it, only in such manner as the law will permit. On the other hand, it would leave it open to trustees to barter with a residuary legatee, or next of kin, by determining to exercise the discretion in such a way as to defeat the benefits they would receive, unless upon terms made by them. This, it is submitted, would be a virtual repeal of the act.

*Clarke*, in reply. From the context of the will it appears that the testator did not contemplate the acquisition of land, for the original intention, as expressed, appears to have been to erect a steeple to the parish church, a purpose clearly legal; and the presumption is that, by the subsequent part of the gift, the testator had in view objects of a like character. The case of *The Attorney-General v. Williams*, 4 Bro. C. C. 526, s. c. 2 Cox, 387, was a stronger case than this, as to the permanent character of the trust. There the gift was to "establish a school," and was held not be void, because the establishment of a school did not necessarily involve the reduction of land into mortmain. In *Longstaff v. Rennison*, the gift was to be applied towards establishing a school in connection with a particular chapel, and was to be paid over to the treasurer for the time being of such school then; or thereafter to be built, and the evidence in the cause showed that no school in connection with the chapel mentioned had been then built. The Vice-Chancellor held that, under the circumstances, this involved the acquisition of a site upon which to build a school.

June 26. KNIGHT BRUCE, L. J. Whether the words "benefit and ornament of the said town," which the will in this case contains, ought to be deemed equivalent to "benefit or ornament of the said town," or ought not; and whether the will is considered with reference to the statute which we are in the habit of calling the Mortmain Act, or is not, the bequest in question cannot, I think, be read as requiring, or as intending to render necessary an acquisition of land in order to the performance of the trust declared; particularly when the plaintiffs' corporate character and connection with the town of Favers-

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ham are recollected. It does not seem to me to have been, or to be impossible, or even difficult for them to adorn the town in a manner beneficial to it without resorting to a course incapable of being testamentarily authorized; nor do they appear to have entertained, or now to entertain, any intention of contravening the law. Why, then, should the gift be deemed invalid? "Semper in dubiis benigniora præferenda sunt," Dig. lib. 50, tit. 17, 56, is a good maxim of the civil law, which says: "Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi quo res de quâ agitur in tuto sit," Dig. lib. 45, tit. 1, 80; nor, I apprehend, does our own law, or sound reasoning allow us to interpret a gift, or disposition, as intended by the maker of the gift to exceed his power, or right, where he has not by expression compelled such a construction. Why should we be willing to impute a gratuitous preference of wrong to right, or of a course which will frustrate, to a course which will effectuate, his intention. If one orders a thing to be done, but does not say how it is to be done, surely he must be taken to mean it shall, if possible, be lawfully done. The decision in *The Attorney-General v. Bowles* may have been correctly departed from, and I assume it to have been so. The principle, however, on which *Sorresby v. Hollins* was determined, the principle recognized by Lord Lyndhurst in the House of Lords in *The Attorney-General v. Mill*, 5 Bligh, N. S. 593, seems to me indisputably right; and I consider consequently that, whether, on the supposition of the statute not having passed, there would not, or would be a breach of trust committed in laying out the legacy in question, or any part of it in the amelioration, or alteration of land which in the testator's lifetime was not devoted to any municipal or charitable purpose in acquiring land, still, the discretionary authority given to the plaintiffs appearing to extend to a course not at variance with the statute, the bequest is valid, and must have effect given to it. Therefore, the appeal must, in my opinion, be dismissed, and with costs.

TURNER, L. J., after stating the effect of the bequest for the lives of the several parties, and reading the words of the will as to the transfer of the capital of 1,000*l.* bank annuities, said: The question upon this appeal is, whether the gift to the plaintiffs is void by the Statute of Mortmain. The Master of the Rolls is of opinion that it is not, and I agree in that opinion. The argument in support of the appeal was, that the gift necessarily involves either the purchase of land, or expenditure on land already in mortmain. In the former case the gift would be clearly bad; and in the latter it would be clearly bad, the will not pointing to land in mortmain, and it being alleged that it is land on which the money must be expended, and cases were cited on this point. The whole argument rests on the point that this gift involves either the purchase of land, or the expenditure on land. This, however, does not appear to me to be the case. The fund is to be applied in such manner and for such purposes as the corporation shall judge to be most for the benefit and ornament of the town. Keeping within the limits of benefit and ornament, the corporation has a wide discretion, not only as to the purpose for which, but as to

*Ex parte Prichard.*

the manner in which, the fund shall be applied. It is, I conceive, quite within the limits of the trust that both the capital and income of the fund should be invested for purposes other than ornamental. However, it cannot, I think, be said that there can be no purpose of benefit and ornament to which the fund, or the income of it might be applied which would not involve either the purchase of, or the expenditure upon lands. Public seats, which would be both beneficial and ornamental, and would not involve a permanent occupation of the land, might be placed in public walks and places of the town, and other applications of the like nature might be pointed out; and if the law allows one mode of application and disallows another, it will be the duty of the corporation, as trustees, to apply the fund in the mode the law allows. I think, therefore, this appeal wholly fails, and must be dismissed, with costs.

*Ex parte PRICHARD; In re THE LONDON AND BIRMINGHAM EXTENSION, NORTHAMPTON, DAVENTRY, LEAMINGTON, AND WARWICK RAILWAY COMPANY.*

June 28, 1854.

*Company — Winding-up Acts — Creditor — Judgment — Execution — Call at Instance of Creditor.*

A person having a claim as creditor against a company ordered to be wound up was, after various proceedings, allowed to bring an action against the official manager, and recovered judgment for the amount and costs. The order permitting the action directed that the judgment, if any, should be dealt with as the court should direct. The creditor applied for leave to issue proceedings at law or in equity against the property of the company, or against the contributories, or that the official manager might make a call for payment of the demand: —

*Held*, (overruling a decision of one of the Vice-Chancellors, who had refused to make any order,) that he was entitled to proceed at law; but that the court would not make a call, as such an application must be made in the Master's office.

THIS was an appeal from a decision of Vice-Chancellor Stuart, refusing to make an order, on the application of Mr. Prichard to be permitted to take proceedings upon the judgment obtained by him in an action brought by him under the direction of the court, against the above company, for his charges as an engineer. It appeared that Mr. Prichard carried in his demand before the Master, which was by him allowed as a claim only. From this allowance Mr. Prichard appealed to the then Vice-Chancellor Knight Bruce, who referred the matter back to the Master, with a declaration that the debt, if any, due to Mr. Prichard, formed a debt due from the company provable under the winding-up order. The Master then, with the consent of Mr. Prichard, directed an action to be brought against the official manager, the latter admitting in such action that the debt, if any, was a debt of the company. From this direction Mr. Gay, one of

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the contributories, appealed to the late Vice-Chancellor Parker, who affirmed the Master's direction, with the addition, that the judgment to be obtained in the action was to be dealt with as this court should direct. The action proceeded, and ultimately Mr. Prichard obtained an award from the arbitrator, to whom the action was referred, upon which he signed judgment for 1,745*l.* 18*s.* 8*d.* and costs, which were taxed.

The motion was made, before Vice-Chancellor Stuart, on the 26th of May, when his Honor, although he expressed his opinion to be that substantial justice was in favor of Mr. Prichard's application, declined to make any order;<sup>1</sup> and from that decision Mr. Prichard appealed.

*Bacon* and *Terrell*, for the appeal, contended that if the creditor were not permitted to proceed upon his judgment, his remedy was gone; that the 57th and 58th sections of the Winding-up Act, 1848, did not alter or prejudice the rights of creditors; that as a creditor, he was not at liberty to set the Master in motion in the question of a call, and that, therefore, the court would in justice either allow him to proceed upon his judgment, or would itself direct a call to be made to satisfy his demand. They cited: *Prescott v. Hadow*, 5 Exch. 726; s. c. 1 Eng. Rep. 487; *Thompson v. The Universal Salvage Company*, 6 Dowl. & L. P. C. 465; *Lloyd's case*, 1 Sim. N. S. 248; s. c. 3 Eng. Rep. 279.

*Malins* and *Cole*, for Mr. Gay and some other contributories, argued that whatever order were made, the rights of these contributories, who were in no way answerable for this particular debt, would be protected; that if Mr. Prichard were allowed to proceed upon his judgment unrestrictedly against the official manager, the effect would be that executions would issue against persons who were not, in fact, liable to pay.

*Cooper* and *De Gez*, for the official manager, took no part in the argument.

KNIGHT BRUCE L. J. It appears to me and my learned brother that the necessary result of what has taken place is to entitle Mr. Prichard to one of two things: either to have a call made, or to make what he can of his judgment at law out of such persons as in a court of law would be considered liable upon the judgment. It would be improper, and a discredit to the administration of justice, if Mr. Pri-

<sup>1</sup> The ground of his Honor's decision is contained in the following passage of his judgment: "An order having been obtained for the winding up of this company, and this creditor having come in under that order, and having had the benefit of certain other orders, by means of which and of certain admissions sanctioned by the court, he has obtained this judgment, I must consider that his future proceedings to recover payment of his debt must be according to the course of the court, which is assumed to be through the interposition of the official manager."

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chard were to be precluded, not only from the benefit of a call, but also from the right to make his judgment available. I am not aware of any case in which a call has been made at the instance of a creditor, and certainly not by this court in the first instance; and the present application cannot be considered as an appeal from the Master on the subject of a call. I do not dissent at all from what his Honor the late Vice-Chancellor decided, which was no doubt right at the time that it was done; but I think the restraint which he put upon the appellant's proceeding at law should now be taken off. Any party is at liberty to apply to the Master to make a call, and if he should think fit, we wish him to consider himself at full liberty to do so; but if the Master shall, in his discretion, make a call, the parties will be at liberty to come to this court to suspend the proceedings of Mr. Prichard, at law; and this order is to be considered as being made subject to any application that may be made by reason of any such call.

TURNER, L. J. This case was before the Master, and on motion before the Vice-Chancellor; and here, it comes to us to state our opinion whether Mr. Prichard should be allowed to proceed at law, and to issue execution on the judgment he has obtained. It has been said that he ought not to proceed on his judgment, because it was obtained in an action directed by the court to be brought; but the action was directed for the purpose of ascertaining the amount of the debt, it being settled that the debt, if any, was a debt due from the company; and it seems to me to follow, that, the debt being a debt against the company, there must be a right against somebody to recover the debt. It was contended that Mr. Gay and the other respondents represented by Mr. Malins were not liable to this debt, and that the restriction, if removed against the other contributories, should not be removed as against themselves; but it is no part of the duty of this court to answer the question, whether any particular section of contributories is liable to a particular debt, except in the case of a call made for the payment of debts. The object of the act was not to alter the rights of creditors; and this creditor has an undoubted right to proceed at law against all the contributories; the object of the act was only to make out the rights as between the contributories themselves. The court will make no order as to a call, as the application must originate in the Master's office; but Mr. Prichard is to be at liberty to go on at law, notwithstanding the order of the Vice-Chancellor, and to be at liberty to proceed against the property of the company, as he shall be advised.

*Re Wynch's Trust.**Re WYNCH'S TRUST.*

March 18, 25, and 29, and April 21, and June 14, 1854.

*Will, Construction of — Issue — Intention — Personal Annuity.*

A testator gave an annuity of 600*l.* "to A for her life, and the issue from her body lawfully begotten; on failure of which, to revert to my heirs; and I request B and C to act as my trustees for A, so that the said annuity may be secured for her separate use:" —

*Held*, that A was entitled for life only to the annuity, with remainder to her issue.

In a will, the word "issue" is not a technical expression implying, *prima facie*, words of limitation, but will yield to the intention of the testator to be collected from the words of the will.

Assuming the word "issue" to have been a word of limitation, A's life estate would not have coalesced with the estate in remainder, as the one estate was equitable and the other legal.

The decision in *Knight v. Ellis*, 2 Bro. C. C. 570, approved of.

THIS was an appeal from the decision of Vice-Chancellor Stuart, upon the construction of the will of John Wynch, reported, 21 Eng. Rep. 367, where the will and the facts of the case, are set out. It is only necessary to state in addition, that shortly after the death of the testator, on the 8th of May, 1798, a deed was executed by the executors of the testator, reciting that they had bound themselves, after the death of Mrs. Mealy, the legatee, to pay the annuity of 600*l.* among the issue of her body, according to the true intent and meaning of the said will.

In 1806, Mr. Mealy died; and in December, 1808, on the marriage of Mrs. Mealy with Mr. Naylor, a settlement was executed, by which, after reciting the deed of the 7th of May, 1798, and the trusts of the 600*l.* as therein declared, Mrs. Mealy assigned unto the trustees, therein named, the said annuity of 600*l.* and all her interest in the funds, in which the same should be invested, upon trust, to pay the said annuity of 600*l.* to Mrs. Mealy, for her separate use, and, after her decease, upon the trusts, by the will of the said testator, directed and declared of and concerning the same.

The Vice-Chancellor held that the word "issue," was a word of purchase, and that, consequently, Mrs. Mealy took only a life interest in the annuity. The petitioners, who were purchasers from the annuitant, appealed against this decision.

*The Solicitor-General, Lee, and Smith*, in support of the appeal. First, the word "issue," in this will, is not a word of purchase, but a word of limitation. Secondly, the terms of the gift created a conditional fee. *Stafford v. Buckley*, 2 Ves. sen. 170; *Turner v. Turner*, 1 Bro. C. C. 316, 318. The case of *Knight v. Ellis* depended upon the particular words in that will, and does not contravene the well known rule, that the same words, which if applied to real estate, would create an estate tail, would, in the case of personal estate, give an absolute interest in personalty. *Lyon v. Mitchell*, 1 Madd. 467, 496;

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*Tothill v. Pitt*, Ibid. 488; *Britton v. Twining*, 3 Mer. 176; *Chandless v. Price*, 3 Ves. 99. The decision in *Knight v. Ellis*, was not followed in *The Attorney-General v. Bright*, 2 Keen, 57; *Tate v. Clarke*, 1 Beav. 100; *Jordan v. Lowe*, 6 Ibid. 350; *Bird v. Webster*, 1 Drew. 338; s. c. 17 Eng. Rep. 451; Jarman on Wills, Vol. 2, p. 496.

The following cases were also cited: *The King v. Melling*, 1 Vent. 214, 225; *Dodson v. Grew*, Wils. Cas. and Opin. 272; *Holderness v. The Marquis of Carmarthen*, 1 Bro. C. C. 377; *Smith v. Pybus*, 9 Ves. 566; *Hockley v. Mawbey*, 1 Ves. jun. 143; *The University of Oxford v. Clifton*, 1 Eden, 473; *Bigge v. Bensley*, 1 Bro. C. C. 187; *Barlow v. Salter*, 17 Ves. 479; *Ellon v. Eason*, 19 Ibid. 73; *Goodill v. Brigham*, 1 Bos. & P. 192; *Lord Verulam v. Bathurst*, 13 Sim. 374; *Darley v. Martin*, 22 Law J. Rep. (N. S.) C. P. 249, s. c. 24 Eng. Rep. 275; *Forth v. Chapman*, 1 P. Wms. 664; *Dunk v. Fenner*, 2 Russ. & M. 557; *Manning v. Moore*, Al. & Nap. 96; *Doe v. Ru-castle*, 8 Com. B. Rep. 876; *Kavanagh v. Morland*, 1 Kay, 16, s. c. 23 Eng. Rep. 582; *Nevil's case*, 7 Rep. 33; *Taylor v. Martindale*, 12 Sim. 158; *Brediman's case*, 6 Co. 58, b.

*Rolt and Giffard*, for the children of Mrs. Naylor, contra, cited: *Aubin v. Duly*, 4 B. & Ald. 59; *Lees v. Mosley*, 1 You. & C. 589; Prior on Issue, 108, 171, 302; *Night v. Ellis*, ubi supra; *Earl of Chatham v. Tothill*, 7 Bro. P. C. 453; *Daw v. Lord Chatham*, Fearne, 464; Butler's Note to Fearne's Cont. Rem. 49; Sir E. Sugden's Treatise, 237; *Crozier v. Crozier*, 3 Dr. & W. 353; *Stonor v. Curwen*, 5 Sim. 264; *Roberts v. Dixwell*, 1 Atk. 607; *Robinson v. Grey*, 9 East, 1; 2 Powell on Devises, by Jarman, 399.

*Stewart*, for the grandchildren of Mrs. Naylor.

*Malins and Forster*, for the executors of Mrs. Naylor, cited: *Procter v. Upton*, Cox's MSS. O. 70; *Clare v. Clare*, Cas. t. Talb. 21.

June 14. The LORD CHANCELLOR, (LORD CRANWORTH.) This is a question arising under the will of John Wynch, who died in India. The bequest in question is in these words: "I will and bequeathe to my good and virtuous friend, Anna Maria Mealy, now wife of Ridgway Mealy, lieutenant and fort adjutant of Velore, in the Honorable Company's service, an annuity of 600*l.* sterling per annum, to commence six months after my decease, for her life and the issue from her body, lawfully begotten, on failure of which, to revert to my heirs; and I have to request that my very good friends, Nathaniel Edward Kindersley, Esq., and Thomas Cockburn, Esq., will act as trustees, for the said Anna Maria Mealy, so that the said annuity may be secured for her sole use and benefit, and that it may be paid to her quarterly, or half yearly, as they may deem proper."

John Wynch died in the year 1797, and his executors proved his will in India, and afterwards in England. The annuity to Mrs. Mealy, during her life, was secured in India, by an investment of

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20,000 star pagodas, in the names of two gentlemen, merchants at Madras, Adria de Friese, and John De Friese, a twelvemonth after the death of the testator. The transaction was commenced by a deed, bearing date the 8th of May, 1798, purporting to be made between George and James Wynch, the brothers and executors of the testator, of the first part, the two Messrs. De Friese of the second part, and Mr. Kindersley and Mr. Cockburn, the trustees named in the will, of the third part. It was, in fact, executed only by the two Messrs. Wynch, the executors; and it recites the will, the investment of the 20,000 star pagodas, for the purpose of securing the annuity during the life of Mrs. Mealy, and then it recites thus: "And whereas, the said Nathaniel Edward Kindersley and Thomas Cockburn, Esqs., having declined accepting the trusts, for a longer period than the natural life of the said Anna Maria Mealy, the said George and James Wynch have, in further part performance of the said will of the said late John Wynch, deceased, bound themselves, their heirs, executors, and administrators, as follows: that on and after the sum of star pagodas (20,000) aforesaid, shall or may be well and truly repaid to them, the said James and George Wynch, they will well and truly pay, or cause to be paid, the said annuity or yearly sum of 600*l.*, as aforesaid, to such issue of the body of the said Anna Maria Mealy, as shall or may be lawfully begotten during the time of his, her, or their lives, or the lives of the survivor or survivors, to each an equal part or share, with benefit of survivorship, agreeably to the true meaning and intent of the said will, in like manner as they were thereby bound to do, if this indenture, tripartite, had not been entered into." So matters continued until the year 1806, when Mr. Mealy died. The next transaction was a deed, which was executed by Mrs. Mealy, on the occasion of her second marriage with Mr. Hare Naylor. It bears date the 16th of December, 1808, and it recites the prior deed of 1798, the will, the investment of the 20,000 star pagodas; and then it recites, at length, the trust that I have just read, for the benefit of herself, for life, and afterwards of her children; and then it recites the gift of the annuity of 600*l.* to trustees for the separate use of Mrs. Mealy, "upon the trusts by the will of the said testator, John Wynch, directed and declared of and concerning the same;" there having been a previous recital that the trusts of the will were such as I have stated. The marriage took effect, and another deed, of the 23d of March, 1812, was executed some three or four years after the marriage, by which the sum of 12,000*l.*, 5*l.* per cents., was invested in the names of trustees. The first trust declared was for Mrs. Hare Naylor, for her life, then to secure 300*l.* a year to the husband for his life, and after their deaths, in trust for George Wynch, the then sole surviving executor; he became, in truth, therefore, a purchaser of the interest under that deed, whatever the interest was, of Mrs. Hare Naylor, subject to her life interest, and subject to an annuity secured to Mr. Hare Naylor, during his life, if he survived his wife; but, in fact, he died during her lifetime, in March, 1815, and Mrs. Naylor lived until August, 1849. There were issue of the marriage, three children, all of whom

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are still alive; two of them have had no issue, but one of them has six children. There are three children, and six grandchildren: The trustees brought the fund into court under the Trustee Relief Act, and the present question arises, upon a petition which was presented by the representative of George Wynch, who claims, by virtue of the deed of 1812, to be entitled to the fund, as having become entitled to it as a purchaser under that instrument; and his contention is, that Mrs. Hare Naylor, took the absolute interest under the will for her separate use, and that George Wynch, the surviving executor, became, under the deed of 1812, a purchaser for value. This demand is resisted by the issue of Mrs. Naylor, who claim as legatees, under the original will of John Wynch. No question is raised, I must observe, amongst the issue themselves; and it was admitted in the argument that if they, that is, the children or grandchildren, are entitled, then they have arranged, among themselves as to what the distribution of the fund is to be, as far as they are entitled.

The claim of the petitioner is resisted on two grounds: first, that under the will the issue take as legatees by purchase; secondly, that even if Mrs. Mealy took the absolute interest, the respondents are entitled as claiming by assignment under her. This latter point rests on this ground. By the deed of 1798, the executors put a construction on the will which excluded the notion of any absolute interest in Mrs. Mealy, and Mrs. Mealy at that time was a married woman, and had not parted with the fee; but by the deed of 1808, when she was single,—the deed made prior to her second marriage,—she, it is contended, adopted this construction of the will and assigned her interest under the will, that is, in the trusts as recited in that deed, and which were trusts for the benefit of herself for life and afterwards for her issue. Then it is said, whatever was the real construction of the will, yet this was the construction which Mrs. Mealy, competent to deal with the fund if it was her own, had put upon it; and she had assigned it so that it should go according to what would have been its disposition, if, according to the true construction of the will, she was only tenant for life with remainder, so to say, to her children. I confess I think there is very great force in this argument; but I have not thought it necessary to make up my mind finally upon it, being of opinion that she did not take an absolute interest; I think she took for life only, with a gift in the nature of a remainder to her issue. I may observe there is a point which one of the lords justices thinks entitled to great weight, and which I do not say any thing about;—not because I think it is not entitled to weight, for I think it is entitled to very great weight;—and that is, a doubt whether the interest of one was not in the nature of a legal interest, and of the other of an equitable interest; so that there never could be any union, and the rule in *Shelley's case*, 1 Co. Rep. 93, would not apply. I give no opinion upon it. I only advert to it, not having any opinion adverse to that which will be expressed by my learned brother on that subject. I go on the general ground that, even if there were no distinction in the quality of the estates, there was not an absolute interest in Mrs. Mealy. On this subject, I must observe,

the authorities are very far from satisfactory. The principles on which they have gone, in many cases, have not been at all such as I think strictly applicable to questions of this sort; rules drawn from principles of tenure have been adopted as canons of construction, where tenure is out of the question; although in the great bulk of the cases the intention has been hereby defeated. Where, however, I find a rule established, I will not question it or inquire very narrowly as to its origin; but the question is, whether the authorities, which give an absolute interest in personalty to the first taker, do govern this case; that is to say, whether this is a case in which I am bound by authority to hold, that the words of the gift to the issue are words of limitation and not words of purchase. I think not. The first class of cases is that in which the gift, after that to the first taker, is a gift to the heirs of the body. In those cases the courts have held, by analogy to devises of real estates, that the words are so clearly words of limitation, that even the express restriction of the first bequest to a life-estate is not sufficient to exclude the *prima facie* meaning of these words. Such was the case of *Tothill v. Pitt*, which was afterwards reported in the House of Lords. In that case, the testator gave thus: "After the death of Sir William Pynsent, he gave to the said Leonora Ann Pynsent the dividends on the 4,000*l.* bank stock, and the payments growing due on the above annuities, during her life, and then gave her two estates at Putney, to keep, sell, or dispose as she pleases; and, after her decease, he gave all the aforesaid lands, bank stock, and exchequer annuities to the heirs male of her body; and for want of such issue, he gave all the said estates, bank stock and annuities to the plaintiff, by the name of William Daw." It was a gift, therefore, as far as the bank stock was concerned, of the dividends to her for her life; and after her decease, to the heirs male of her body, it was expressly to her for life, and afterwards to the heirs male of her body; and for want of such issue, then over. Now the principles are too well recognized to need any illustration, that the gift of the dividends is just the same as giving her the fund for her life and then to the heirs male of her body, and for want of such issue, then over. What was decided was, that she took the absolute interest in the bank stock, and the Master of the Rolls, Sir Thomas Sewell, before whom the cause was heard, came to that conclusion; for he says, 1 Madd. 509: "There is no doubt but that the intention ought to prevail, if it can be enforced without breaking in upon any rule of law; but the rule that words which would give an estate tail in a freehold are to be considered in the case of chattels as giving the thing absolutely; for that no chattels can be limited over after a dying without issue. The rule is too strong to be got over." That was what the Master of the Rolls decided. That decision was reversed, I think, by the Lords Commissioners; but the decision by the Master of the Rolls was eventually sustained in the House of Lords. Just on the same principle was decided the case of *Elton v. Eason*, decided by Sir William Grant, where the gift was thus: The testatrix left to trustees all her moneys and effects, whatsoever and wheresoever, to hold to them, their heirs,

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executors, administrators and assigns, upon the following trusts; subject to her debts, legacies, &c., "to apply the residue of the rents and profits of my estates and effects for my son during his life, and afterwards for the heirs of his body, if any." Sir William Grant held that to be an absolute interest in the first taker; and his expressions are: "Whatever disposition would amount to an estate tail in land, gives the whole interest in personal property, which is incapable of being entailed." "The words 'if any' have no restrictive effect; and then it is a mere limitation over after a general failure of heirs of the body, which the rules of law will not permit to take effect." There was another case before that learned judge, of *Britton v. Twining*, which was this: The testator gave 20,000*l.* "which he would have so secured that William Cobb may only receive the interest of the same during his life; and after his decease, to the heirs male of his body; and so on in succession to the heir at law, male or female." Here, again, though there was an express restriction for life, Sir William Grant held that the first taker took an absolute interest. In those cases, the principle on which the courts went was this: that it was quite clear that technical words were used which, in the opinion of the court, indicated the clear meaning on the part of the testator that the property should go in a course of devolution till there was an exhaustion of the heirs of the body. That they of course held could not be carried into effect, and that it gave therefore, the absolute interest.

In those cases, the words "heirs of the body" are, as we know, technical words, words of art almost mysteriously inflexible; but it must be admitted also, that where the more manageable expression "issue" is used, still, if there is nothing to show that that word was not intended as a word of limitation, nothing to show an intention to confine the first taker to a life-estate, it has been held to be in the nature of a word of limitation when used with reference to personal estate, equally with the words "heirs of the body." That was the case of *Lyon v. Mitchell*. In that case, the testator gave "the rest of his estate, real and personal, whatsoever and where-soever, and of what nature and kind soever, unto his executrix and executors, upon trust to pay certain legacies to his daughters and annuity to his wife; and the residue he directed, to be divided equally amongst his sons, John Lyon, Edmond P. Lyon, Benjamin Lyon, and George Lyon, and such son and sons as his wife should, or might be *enroute* of at the time of his death, or at any time during his life, if such son and sons shall be born alive, share and share alike, as tenants in common, and to the issue of their several and respective bodies lawfully begotten." Sir Thomas Plumer held that there was nothing to show that the word "issue" was not intended as a word of limitation. The words must be taken as meaning, in spite of an express life estate given to the first taker, that it was to be an interest to devolve from time to time to all the issue, so that the first taker must be taken to have had an absolute interest. The word "issue" must be considered as incorporated into and forming part of the gift to the first taker, and not as amounting to a sub-

sequent gift to the issue. So, again, where there is no express gift to the issue, but, after an indefinite gift, there is a gift over in default of issue of the first taker, there the first taker in the case of real estate is considered, by implication, to take a gift to him, or his issue; and the same rule has been adopted with regard to personalty. There is the case of *Chandless v. Price*. I have taken a short note of it as follows: "I give the residue of my real and personal estate in failure of legitimate issue by my daughter Mary Williams, to my daughter-in-law, Catherine Jennings; and after her decease without legitimate issue, to Sarah Medhurst, for her sole use, and to be divided equally after her death between her children;" and it was held to be an absolute interest in Mary Williams. Therefore, that was just the same thing, whether the gift was by implication or express. It was the same thing as if it had been given to the first taker, Mary Williams and her issue. But, indeed, in that case, and in similar cases perhaps, no such rule of construction need be resorted to; for as the gift to the first taker, without more, would carry an absolute interest, the subsequent gift, on an indefinite failure of issue, was necessarily void for remoteness. In all these cases, the rule applied to real estates, derived from principles of tenure, has been made the foundation of the rule for construing bequests of personalty; but in these cases, either the technical words "heirs of the body" have been construed, or there has been nothing to show that the words "issue," "children," or the like, have not been intended merely to define, or explain the extent of the interest given to the first taker; and I see nothing in these decisions compelling me to hold, that where technical words of art are not used, and where the interest of the first taker is expressly confined to a life estate, I should be bound to act, in the construction of bequests of personalty, on principles derived from laws of tenure, and not resting on intention. It was on this distinction that Lord Thurlow acted in the case of *Knight v. Ellis*. There the testator directed certain rents to be accumulated till his grand-nephew should attain his age of twenty-one years; and after that event, he gave the interest of that accumulated fund to his grand-nephew for his life; and after his decease, he gave the fund to his issue; and in default of issue to his nieces. It was argued, that as this would have been an estate tail in real property, therefore it was an absolute interest in personalty; but Lord Thurlow held otherwise. He gave effect to the manifest intention, not thinking himself fettered by the analogy of a real estate when the result would have been arrived at on principles not founded on intention, but often operating in direct opposition to it. I cannot consider that case overruled. I believe it to have been rightly decided, and, at all events, if it was wrongly decided, I think it can only be questioned in the House of Lords. I am aware that there have been three decisions by Lord Langdale and one by Sir R. T. Kindersley, V. C., where those learned judges are supposed to have treated that case as not being law. The first of these cases is the case of *The Attorney-General v. Bright*, before Lord Langdale, in the year 1836. There a sum of 500*l.* was given to Susan Thomas, daughter of Joseph Thomas, to receive the interest during life, and then to her issue; but

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in case of her death without issue, the said 500*l.* to be divided between her father's children.

Now, undoubtedly, *Knight v. Ellis* was cited in that case, but the judgment is so extremely short that what the grounds of the judgment were on which Lord Langdale proceeded, it is very difficult to discover. The judgment is: "The Master of the Rolls held that the effect of the gift of the sum of 500*l.* to Susan Thomas, to receive the interest during her life and then to her issue, was to give her an absolute interest in that sum, and that such absolute interest was not affected by the subsequent words of the will; the limitation over in case of her death without issue, unrestricted by any words limiting the generality of the expression 'without issue' being void for remoteness." Now, I confess that if that was the decision, that went on the ground that *Knight v. Ellis* was not law. It is so shortly given, and so little said about it, that I do not think it would be safe to treat that as having overruled the decision that had been come to after great deliberation, and evidently well considered by Lord Thurlow half a century before. A great many cases may have taken place, and a great deal of money may have been disposed of on the faith of that decision, and it would not be safe to treat that case as having overruled the decision in *Knight v. Ellis*. The next case was one a few years afterwards, of *Tate v. Clarke*, in which I am not at all clear I should not entirely have agreed with Lord Langdale. I do not think the case of *Knight v. Ellis* was referred to. It was the gift of real estate "unto and amongst all and every my brothers and sisters who shall be living at the time of the decease of my wife, and to their issue, male and female, after the respective deceases of my brothers and sisters forever, to be equally divided between and amongst them." And then he gave the residue of the money to trustees "upon trust to pay and apply the same unto my said brothers and sisters in the same manner as it is directed with regard to the rents and profits of my freehold estate:" that is, it was a gift of the residuary personal estate to trustees "in trust to pay over the profits to all and every my brothers and sisters who shall be living at the time of the decease of my wife, and to their issue, male and female, after the respective deceases of my said brothers and sisters forever." Now, I am not at all satisfied that I should not have come to the same conclusion, because the word "issue" may be meant as a word of limitation in respect of personal estate as well as of real estate, and the expressions strongly show that was the meaning of the testator. The words were there used as indicating the extent of the interest which was given to the first taker, although continued in succession forever afterwards to the posterity of the first taker. Therefore, I think that case not at all irreconcilable with the case of *Knight v. Ellis*. Another case was also before that very learned judge, that of *Jordan v. Lowe*, in 1843. There, some leaseholds were given to trustees, "to suffer my cousin Robert Jordan, son of my uncle Jonathan, to hold and enjoy, or to receive and take the rents, issues, and profits thereof, to his own use and benefit during the term of his natural life; and from and immediately after the decease of the said Robert Jordan,

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then I direct my said trustees to pay the rents and profits thereof to his issue male, lawfully begotten, severally and respectively, according to their respective seniorities." The report of that case is extremely short. No argument at all was given, and I was going to say no judgment. It is this: "The Master of the Rolls was of opinion that the plaintiff took a *quasi* estate tail, and said he must make a decree in favor of the plaintiff according to the prayer of the bill."

Upon what grounds Lord Langdale proceeded we are left in entire ignorance. But it may be that he thought there, that the words must be treated as words of limitation, as it was to go to them in succession forever, according to their seniorities. That might have been the ground on which he proceeded in that case: that also would not be inconsistent with *Knight v. Ellis*. With regard to all these cases I am of opinion, with all deference to that very learned judge, that the judgment of Lord Thurlow cannot be considered as properly overruled by these decisions, even if they were inconsistent with that judgment. The only other case is the one before Sir R. T. Kindersley, V. C., last year, the case of *Bird v. Webster*, in which the language was, "to invest in the public funds 1,000*l.* in each child's name, and 1,000*l.* in my wife's, the interest to be received by them regularly for their life, and afterwards to their descendants, except my wife's, which is at her death to be sold out and divided amongst them." It was said, in truth, there was no decision that actually touched the case. Here, no doubt, the Vice-Chancellor, from some expressions which fell from that very learned judge, would seem to indicate he thought it clear, that in every case where it would be an estate tail in real estate it would be an absolute interest in personalty. What he says in his judgment is this; (1 Drew. 340, s. c. 17 Eng. Rep. 451): "The will then proceeds, 'the interest to be received by them regularly for their life.' Then comes the expression on which the question in this case turns, 'and afterwards to their descendants.' Now, if the will stopped there, if there were no more, I should be bound to come to the conclusion contended for by the petitioners; for where there is a gift to A. for life, remainder to the descendants of A., it is clear that, if real estate, it is an estate tail; if personal estate, it gives him the absolute interest. But that is not all." And then he goes on, and reasons upon it; but no decision on the point is actually come to. I take it rather as an indication of that learned judge's opinion unfavorable to the conclusion in *Knight v. Ellis*, though not reasoning upon it, or saying he would not act upon *Knight v. Ellis*; but I take it to be an indication of an opinion that the distinction in *Knight v. Ellis* was not sustainable as a distinction. With all deference, I do not think it can be so disposed of. No reasons are given in *The Attorney-General v. Bright*; and those other two cases before the Master of the Rolls are perhaps distinguishable, for the reasons I have mentioned, namely, that in *Tate v. Clarke*, the first taker was not expressly confined to the life estate, and in *Jordan v. Lowe*, the issue were to take in succession, and the intention would be as much defeated by giving an absolute interest to the first taker as by giving it to a parent. In this

case, before Kindersley, V. C., the decision was only that the children took a defeasible interest. Certainly, the language of that very learned judge goes further; but *Knight v. Ellis* was not cited; and that case is not one upon which I can act in opposition to such a decision of Lord Thurlow. I have been assuming that the case of *Knight v. Ellis*, if it be good law, governs the present; but I do not forget that this was denied by Mr. Lee. He said, he admitted the authority of *Knight v. Ellis*, but he contended it was a case which did not rule the case now before us; but to this I cannot agree. Here the gift is to Anna Maria Mealy for her life and to the issue from her body lawfully begotten. It is true the words, "and after her decease," which occur in *Knight v. Ellis*, are not found here; but I think they are necessarily implied. The meaning is plain, that the legatee shall enjoy for her life, which means for her life only, and "then," which must mean when her life interest is over, that it shall go to the issue. I can discover no sort of distinction between the two, nor do I think that there is any distinction arising from this being a gift of an annuity or not of a mere personal fund. I will assume the petitioner to be well founded in his proposition, that this annuity would pass to the heirs and not to the executor; but I think that is not material. The question is, by what rule are we to construe the words by which it is given? Are we to act upon rules having their foundation upon and springing from principles of tenure, or are we merely to look at the language used in order to ascertain the intention of the giver? I think that, even assuming this to be an annuity to pass to the heirs, still, the feudal reasons have no place in determining the meaning of the words used in creating or disposing of it; it is still personal estate, to be governed by the same rules which regulate the construction of other dispositions of personalty. I have, therefore, come to the conclusion that the construction put by the Vice-Chancellor on this will was correct, and that his order must be affirmed, except that a provision must be made for the paying of 600*l.* annuity to the issue out of the dividends and corpus of the fund, according to the arrangement that they have made among themselves.

**KNIGHT BRUCE, L. J.** The respondents, who claim to be interested in the present controversy, have no dispute or difference among themselves, and desire merely that, to the exclusion of the appellant, or at least in preference to his claim, the cash and stock in question and the future dividends of the stock shall be subject as from the death of the late Mrs. Hare Naylor to the payment of 600*l.* per annum to those respondents or one of them, until the exhaustion in that way of the entire fund, both capital and income, or the death of the survivors of the children and grandchildren of Mrs. Hare Naylor's second marriage who were living at her death, whichever event should first or alone happen. This, however, is asked, without prejudice to any question of right after the happening of either event. And as it is clear that to the respondents claiming to be interested, and to the appellant, or to some or one of them, the whole stock and cash absolutely belongs, it is only necessary to decide one of two points,

first, whether the words, "issue from the body lawfully begotten," contained in Mr. Wynch's will, are words of limitation or of purchase; secondly, if they are words of limitation, what is the effect of the deeds of 1798 and 1808 taken together? And it is upon the latter of these two points alone that I purpose stating my opinion; the view I take of that rendering it, as I conceive, from the circumstances I have mentioned, unnecessary for me to deal with the other. I think it a correct and just inference from the materials before the court, that the marriage of Mr. and Mrs. Hare Naylor took place under the belief and on the understanding on their part that the true construction and effect of the will of Mr. Wynch, as to the annuity of 600*l.* per annum given by it, were such as is mentioned in the deed of the 8th of May, 1798; and such, accordingly, as to confine the interest in that sum and the right to it, after Mrs. Hare Naylor's death, for her issue, if any living at her death, at least so long as any child or descendant of Mrs. Hare Naylor living at her death should be in existence, if not more extensively defined. It must, I conceive, be taken that the conduct and arrangements of Mr. and Mrs. Hare Naylor preliminary to the marriage were regulated or influenced by that belief, by that understanding. It appears to me that their marriage settlement, the deed of the 16th of December, 1808, contains what in effect is tantamount to a declaration on their part, and a contract between them, that the will of Mr. Wynch as to the annuity was to be so construed practically, and should be so acted upon. From this declaration, and from the contract, it is, I apprehend, impossible for them, after their marriage, to recede, at least to the prejudice of any issue of their marriage living at Mrs. Hare Naylor's decease. Whether this construction of the will was accurate or inaccurate, — as to which I have said that I mean to assert nothing, — there being now alive children of the marriage as well as grandchildren of the marriage, who were living at Mrs. Hare Naylor's death, — there being no dispute among the respondents upon this occasion, who include all the issue of the marriage, living at Mrs. Hare Naylor's death, nor a question raised by any of them, — the only point we are asked to decide being, I repeat, whether the appellant is so interested, and what interest, if any, he has in the fund and subject of contention, the correct conclusion I apprehend to be, that the stock, its income from the death of Mrs. Hare Naylor, and its future income, are chargeable, either primarily or exclusively, after paying the costs, given by the order under appeal, and the respondents' costs of this application, with the payment, as from Mrs. Hare Naylor's death, of 600*l.* per annum to the respondents claiming to be interested, or some or one of them, until the exhaustion by this means of the property thus charged, or at least until the death of the survivor of Mrs. Hare Naylor's children and grandchildren living at her death. I think, accordingly, our order ought to provide for this, that it shall be without prejudice to any question as to the right to such portion, if any, of the property as shall remain unexhausted at the death of the survivor of those children and grandchildren, and in that case without prejudice also to any claim of the respondents or any

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of them, under the will of Mr. Wynch, in the event of the exhaustion taking place before the death. Practically, therefore, and in effect, my manner of viewing the case and proposed mode of dealing with it, seems to be scarcely or not at all more favorable to the appellant than are those of the Lord Chancellor and Lord Justice.

TURNER, L. J. This case presents to our consideration questions of great difficulty both upon the construction of the will of the testator and upon the effects of acts which were done or concurred in by Mrs. Naylor after the testator's death. I allude particularly to the deeds of 1798 and 1808, to which my learned brother has particularly referred. I allude to those deeds, however, only for the purpose that I desire it to be understood that I neither assent to nor dissent from the conclusions which have been drawn from them, and that I give no opinion as to their operation or effect; but that my judgment in this case rests upon the construction of the will. The testator, who was an official in the East India Company's service, by his will, after directing payment of his debts and giving some legacies to servants, has proceeded as follows: "Item. I will and bequeathe to my good and virtuous friend, Anna Maria Mealy, now wife of Ridgway Mealy, lieutenant and fort adjutant of Velore, in the Honorable Company's service, an annuity of 600*l.* sterling per annum, to commence six months after my decease, for her life and the issue from her body lawfully begotten; on failure of which, to revert to my heirs. And I have to request that my very good friends, Nathaniel Edward Kindersley and Thomas Cockburn, Esqs., will act as trustees for the said Anna Maria Mealy, so that the annuity may be secured for her sole use and benefit, and that it may be paid to her quarterly or half-yearly, as they may deem proper. Item. I also leave and bequeathe to the said Anna Maria Mealy 1,000*l.* sterling, so as to enable her to pay the passage to Europe; and I request my executors will not delay paying this sum. Lastly, I will and bequeathe, after all the above have been executed, to my brothers, George and James, the residue of my estates, real and personal; and I hereby appoint and nominate my brothers, George and James, my sole heirs and executors, and I have no doubt but what they will see this, my last will and testament, put in execution agreeable to its meaning, without squabbling or disputing." Mrs. Mealy, the annuitant, to whom and to whose issue this annuity of 600*l.* is given, was, as is mentioned in the will, the wife of Lieutenant Mealy. She had no issue by him, but she survived him, and, after his death, married Mr. Naylor, by whom she had issue. She has lately died, and her issue have survived her, and one is still living. That the annuity is so given as to endure so long as there shall be issue of Mrs. Mealy, afterwards Naylor, admits of no question. The question upon the construction of the will, which we have to determine, is, whether Mrs. Mealy took the absolute and entire interest in the annuity, or took the annuity for life only. If this question were to be determined upon the language of the will, namely, without reference to any rules of law or to any decided cases, no doubt could, I think, be entertained upon it;

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the limitation of the annuity to Mrs. Mealy for her life, would of itself be sufficient to show that it was intended to be given to her for her life, and for life only, and the intention would decide the question. But it was argued, on the part of the appellant, that this annuity partakes of the character of real estate; that it is descendible to heirs; that a conditional fee may subsist in it, although it is not capable of being entailed, not being within the statute *De Donis*; that it ought, therefore, in construing this will, to be considered as real estate; and that, so considering it, Mrs. Mealy took a conditional fee in the annuity, which became absolute in her upon the birth of issue. And it was further argued, on the appellant's behalf, that under a devise of real estate, couched in the terms in which this annuity is given, Mrs. Mealy would have been tenant in tail; and that the rule of this court is, that the same words which would create an estate tail in realty, confer the absolute interest in personalty; and, therefore, taking this annuity to be personal estate, Mrs. Mealy equally took an absolute interest in it. Admitting, however, that this annuity partakes of the character of real estate, and would descend, and may be limited in the manner pointed out, it does not, as I apprehend, follow that, in construing this will, it ought to be considered as real estate. It is, in fact, personal estate with peculiar incidents belonging to it in that character, according to the decision in *Aubin v. Daly*; and to treat it as real estate for the purposes of construction, would be to disregard its nature, and pay regard only to its incidents. Both the nature and incidents of the property must, no doubt, be considered in determining the construction of the will. The incidents can no more be disregarded than can the nature of the property. Due weight must be given to each; but this branch of the argument cannot, I think, be carried further. We come then to these further questions: first, if this had been a devise of real estate, would Mrs. Mealy have been tenant in tail of the devised estate? and, secondly, assuming that under a devise of real estate, in the terms of this will, Mrs. Mealy would have been tenant in tail, does it or not follow that she became entitled to an absolute interest in this annuity? The first of these questions was not very fully discussed at the bar in the argument, on the part of the respondents; but it is plainly a question of great importance to their interests: for, if it shall appear that Mrs. Mealy would not have been tenant in tail of real estate devised in these terms, there can be no foundation for the appellant's contention, that Mrs. Mealy was entitled to an absolute interest in this annuity. This question, as I view it, depends wholly upon the construction of the will; and upon this point, namely, whether the estate of Mrs. Mealy, and of her issue, are to be held to be both legal, or to be both equitable, in which case they would coalesce, — or whether the one estate is to be held equitable and the other legal, in which case there would be no coalition. That there would be a coalition of the estates, and that Mrs. Mealy would be tenant in tail if the case rested upon the devise to her for life and her issue, is, I think, established by the cases cited on the part of the appellant; and the question, therefore, depends upon what is the effect of the ulterior clause contained in this will:

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"And I have to request that my good friends, Nathaniel •Edward Kindersley and Thomas Cockburn, will act as trustees for Anna Maria Mealy, so that the annuity may be secured for her sole use and benefit, and that it may be paid to her quarterly or half-yearly, as they may deem proper." It is evident from this clause that the intention of this testator was, not only that there should be trustees of the interest taken by Mrs. Mealy, but her enjoyment of that interest should be continued by this discretion of the trustees. The trustees were to secure the interest for her separate use; and what she took was to be paid to her half-yearly or quarterly, at their discretion. How were these purposes to be accomplished if the legal interest in the property given was to remain in Mrs. Mealy? It would seem, therefore, that the testator must have intended that, during Mrs. Mealy's life, the legal interest should vest in the trustees. It is true, that there is not, in terms, any gift to them; but if it be clear that the testator intended that they should take, it is not, as I apprehend, material that there is an absence of the mere words of gift. The cases of *Oates d. Markham v. Cooke*, 3 Burr. 1685; and *Trent v. Hamming*, 1 Bos. & P. N. R. 116; s. c. 10 Ves. 495; 7 East, 97, are, I think, sufficient to establish that proposition. It may be said, that those cases are distinguishable from the present, inasmuch as in those cases there was no other devise of the estate; but in the present case, there is a devise to Mrs. Mealy. I do not think, however, that this alters the case. The question is one of intention; and if the intention be plain, as in this case it appears to me to be, and the express devise were intended to pass the beneficial interest only, effect must, as I conceive, be given to the intention. The case of *Doe v. Woodhouse*, 4 Term Rep. 89, seems to me to support this view. In my opinion, therefore, under a devise of real estate in the terms used in the will, the interest of Mrs. Mealy, during her life, would have been equitable merely: would then the interest of the issue have been equitable also? I think not; for I take the general rule to be, that the *quantum* of the estate of the trustees is to be measured by the purposes of the trust; and the purposes of this trust would not require that the estate should remain in the trustees beyond Mrs. Mealy's life; and independently of any general rule, I think that it plainly appears from this will, that the estate of the trustees was created only with a view to the life estate, and was not intended to continue after its determination. It was said, however, that Lord Lyndhurst decided this point as to the coalition of the estates, in his judgment upon the appeal, in the case of *Naylor v. Wynch*, 1 Sim. & S. 555; and I should, of course, be disinclined to differ from so high an authority; but I have more than once read Lord Lyndhurst's judgment with much attention, and I am satisfied that it imports no more than that, whatever Mrs. Naylor took, she took for her separate use, leaving it wholly undecided what she took; a question which, upon the facts under Lord Lyndhurst's consideration, it was quite unnecessary for him to decide. This being the conclusion at which I have arrived upon the question whether Mrs. Mealy would have been tenant in tail of real estate devised in the terms of this will, it is not material for me to state my

opinion upon the question whether, if Mrs. Mealy would have been tenant in tail of real estate so devised, she would, therefore, have been entitled absolutely to this annuity; but I am prepared to state my opinion upon that point also.

This case, I think, cannot be distinguished from *Knight v. Ellis*; and it is upon the appellant, therefore, to show that *Knight v. Ellis* either has been or ought to be overruled. No case has been cited in which it has been expressly overruled, nor has any decision by a judge of equal authority been produced, which is, in my opinion, inconsistent with it. There are, indeed, decisions by the late Master of the Rolls which strongly indicate the opinion of that learned judge to have been, that words which would create an estate tail in realty would operate to give the absolute interest in personalty; and at least one of those cases—I mean *The Attorney-General v. Bright*—is not, perhaps, reconcilable with *Knight v. Ellis*. There is also a case before Sir R. T. Kindersley, V. C.—I refer to the case of *Bird v. Webster*—in which he expressed his opinion to be that under a gift of personalty to A. for life and afterwards to his descendants, A. would take the absolute interest as he would have taken an estate tail in realty. But in neither of the cases before Lord Langdale, nor in that before Sir R. T. Kindersley, V. C., were the authorities subsequent to the case of *Knight v. Ellis* so fully entered into as they have been in the argument before us. It seems in those cases rather to have been assumed than established, that the authorities subsequent to *Knight v. Ellis* had settled the point. On examining these authorities, however, I do not think that this is by any means the case. In some of them, as in *Lyon v. Mitchell*, the limitation was to A. and his issue, and in default over; and A. was held to have taken absolutely, because the limitation “in default of issue” showed that the gift was meant to extend to all the issue, and all the issue might not be capable of taking jointly with the parent. In others of these authorities, as in *Chandless v. Price*, the gift has been to A, and in default of issue of A, over; and here, again, A has taken absolutely, there being no gift to the issue, and no other means by which the gift could reach them. Again, in others of these cases, as in *Britton v. Twining* and *Elton v. Eason*, the gift has been to A. for life, and after his decease to the heirs male or heirs of his body; and A. has taken absolutely; the technical words “heirs male” and “heirs of his body” importing inheritance from the ancestor. And, again, in others of the cases, as in *Mogg v. Mogg*, 1 Mer. 654; and *Dunk v. Fenner*, the real and personal estates have been made subject to the same limitations, and the disposition of the personal has been governed by that of the real, which, however, is not always the case. *Hockley v. Mawbey* was also a case in which the real and personal estates were made subject to the same limitations; as in that case, too, the gift was to the son and his issue, and in default of issue, over. These cases, therefore, are distinguishable from *Knight v. Ellis*, and cannot, I think, be said to overrule it. The observations of Sir Thomas Plumer, in *Lyon v. Mitchell*, tend, no doubt, to impeach the case; but, on the other hand, it has been cited in other cases without

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disapprobation. The case is said to be impeached also by the dicta to be found in many of the authorities upon this subject: that the same words which would create an estate tail in realty would give the absolute interest in personalty; but these dicta were not pointed to the case of *Knight v. Ellis*; and if taken in their full sense, and as they stand, without qualification, they certainly go beyond what the authorities would warrant. I may observe, also, that in the late case of *Darley v. Martin*, the Court of Common Pleas did not treat the case of *Knight v. Ellis* as overruled; although the point was open before them, they decided the case upon a different ground. I think, therefore, the case of *Knight v. Ellis* cannot be said to have been overruled. We come, then, to the question, whether it ought now to be overruled? The question in effect is, whether, admitting that under a disposition of real estate in the terms of this will the word "issue" would be construed as a word of limitation, it is, therefore, to be so construed in this disposition, applying to personal estate. Is this court, in construing a disposition by will of personal estate, to be absolutely governed by the rule which would be applied at law in the case of real estate? Before arriving at such a conclusion, it is, I think, our duty to consider upon what foundation the rule of law proceeds, and whether it rests upon a foundation at once applicable to personal estate. The rule at law which construes "issue" as *prima facie* a word of limitation, rests, as I apprehend, upon one or other of these foundations. It is either derived from the old law, which, upon feudal principles, was much directed against the successors to real estates taking otherwise than by descent, or it rests upon the ground that the word "issue" taken *per se* includes all the issue, and that the best mode of effectuating the intention in favor of all the issue is to give an estate tail to the parent, which in the course of devolution would embrace them all. Surely, a rule resting upon such foundations can have no application to personal estate. The feudal principle does not reach to the subject-matter, and so far from the application of the rule to personal estate effectuating the intention, it directly and immediately defeats it, for it gives the absolute interest to the parent and prevents the issue, *quà* issue, from taking any benefit under the disposition. It is said, however, that a different effect ought not to be given to the same words as applied to real and personal estate; but the subject-matters are wholly different. The real estate is capable of entail, the personal not; and I can see no reason why a testator using the word "issue" with reference to property which is not capable of being entailed, is to be considered to have had the same meaning as if he had applied it to property which may be entailed. It is, indeed, settled by *Forth v. Chapman*, that the same words may receive a different construction as to real and personal estate; and it would, I think, be difficult to find a case to which that authority could be better applied than the case before us. The great principle in all cases upon the construction of wills is, that the intention of the testator is to be carried out as far as is consistent with the rules of law; and I am satisfied that the construction put by Lord Thurlow upon the will in *Knight v. Ellis*, was much more

*Ex parte Underwood; In re The Eastern Counties and Southend Junction Railway Co.*

conformable to the testator's intention than the construction which has been contended for in the present case. I am not, therefore, inclined to dissent from the case of *Knight v. Ellis*; and, at all events, I am fully prepared to say with the Lord Chancellor, that if it is to be overruled, it must be by higher authority than I possess. It is not a case which stands by itself. There are other authorities to the same effect, among which I may mention *Clare v. Clare* and *Warman v. Seaman*, Finch, 279. It is contended, on the part of the appellant, that the property in question in this case, being a perpetual annuity, the decision in *Knight v. Ellis*, even if supported, would not apply; and the case would be governed by *Stafford v. Buckley*; but, although the nature of the property might prevent it from being entailed, it would, if Mrs. Mealy took a conditional fee, vest in her absolutely upon the birth of issue; and I think, therefore, the nature of the property does not vary the case, and *Stafford v. Buckley* does not apply, for in that case the word "issue" was clearly explained by the context to mean "heirs of the body." It is remarkable, however, even in that case, that Lord Hardwicke reserved the question between the tenant for life and the issue, as to the general personal estate. That case, however, opens a question as to the extent of the rights of the issue which it is not now necessary to decide, and which is, indeed, not now ripe for decision; and I think, therefore, that the fund cannot be paid out as directed by the order, but the 600*l.* a year must be paid to the issue.

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*Ex parte UNDERWOOD; In re THE EASTERN COUNTIES AND SOUTHERN JUNCTION RAILWAY COMPANY.*

July 21, 22, and 23, 1854.

*Company — Winding-up Acts — Contributory — Compromise — Call — List of Contributories — Order exceeding a Notice of Motion — Change in the View of the Law.*

An order was made for winding up an abortive railway scheme. A list of contributories was prepared, but it contained the word "adjourned" written in pencil against some names. Six persons were comprised in the names on this document. The Master made a call upon the six, and, against the consent of the official manager, compromised the liabilities of five of these persons by payment of a stated sum each. The sixth person was a managing committee-man, and although he at one time denied his liability before the Master, he ultimately consented to remain. He then gave two notices of motion, one to remove his name from the list, and the other to discharge the order for a call, or that the compromise might be set aside. One of the Vice-Chancellors considered that the order to wind up could not be sustained, as there was, in fact, no company to wind up, and, therefore, he discharged the order for the call, and ordered all further proceedings under the winding-up order to be stayed. The official manager appealed. On the hearing of the appeal, this contributory offered to pay back the money which the other five had paid on the compromise:—

*Held*, that the court below had no jurisdiction to make the order to stay proceedings, it being a rule of the court that where necessary parties, being served, do not appear, the terms of

*Ex parte Underwood; In re The Eastern Counties and Southend Junction Railway Co.*

the notice of motion cannot, so far as they are interested, be materially departed from; that, notwithstanding the dissent of the official manager to the compromise, and the offer of the party moving to repay the money the compromising contributories had paid, the compromise could be supported; and that the list of contributories was not such as the act of parliament required.

THIS was an appeal from an order of Vice-Chancellor Stuart. The proceedings in the Master's office, which were referred to during the argument, were very voluminous, and the statements of counsel lengthy. If a preliminary statement of the facts were made, they would not preclude the reiteration of some of them, in the arguments of counsel, nor a recapitulation of others, in the judgment of the court; it has, therefore, been considered best to divest this report, as much as possible, of a formal character.

The Eastern Counties, and Southend Junction Railway Company, was projected in 1845, and was ordered to be wound up in 1849. Only one debt was proved, and that was for 500*l.*, but the costs of the winding up amounted to 670*l.* A list of contributories was prepared, but it contained in various parts the word "adjourned," written in pencil, one of which words was opposite the name of Mr. Underwood. That gentleman was on the committee. A correspondence took place between him and the secretary, respecting his shares, which is referred to below. The Master made a call upon Mr. Underwood, and five other gentlemen, whose names were on the alleged list of contributories; and although the official managers dissented from such a course, he made a compromise with those five contributories, discharging them from all further liability, on payment of 120*l.* each. Mr. Underwood gave two notices of motion, one for the removal of his name from the list, and the other that the order for the call might be discharged, or that the compromise might be set aside; and on those motions coming before Vice-Chancellor Stuart, his Honor made the order now appealed from, by the official manager.

*Malins*, for the appeal, stated that after the case had been opened before the Vice-Chancellor, on behalf of Mr. Underwood, his Honor observed that as it appeared no company had ever been formed, nor any affairs had existed, capable of being wound up, the order to wind up had been obtained on untrue representations, and that, therefore, there was a *prima facie* case for discharging the order to wind up, and called upon the counsel, for the official manager to address the court upon that point; that he (Mr. Malins) and Mr. Roxburgh had respectfully declined to enter into such a discussion—first, because they were unprepared; and secondly, that the form of Mr. Underwood's own motion assumed that the order to wind up was right—yet that the Vice-Chancellor had made the order now appealed from, by which it was declared that, it appearing to the court that the company never was formed, the Master's order for a call should be discharged, and all further proceedings in the winding up should be stayed, with liberty to the official manager, or any parties interested to apply; that the present appeal was for the purpose of altering or varying the order of the court below; that Mr. Underwood had been

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an active party in getting up the company, and was a zealous supporter of it, and had remained contentedly on the list of contributories for three years, and, in fact, had so remained in the hope and expectation of recouping himself, all or a part of a sum of 150*l.* which he had paid; that the secretary of the company, on the 2d of October, 1845, wrote a letter to Mr. Underwood, telling him that, as a committee-man, he was entitled to one hundred shares, and asking whether he would accept them, and, if so, to answer by a certain time, in the letter mentioned; that to this letter, a letter signed with the name of Mr. Underwood was received by the secretary, dated the 9th of October, accepting the 100 shares, and more if they were to be had; that during the proceedings in the Master's office, the handwriting to this letter was denied by Mr. Underwood, although it was sealed with the seal of a club to which Mr. Underwood belonged; that at a later period his solicitor stated that, although Mr. Underwood denied the writing of the letter, still, as perhaps some things might be proved against him, he was willing to remain on the list of contributories, so that he was on the list by his own consent; that having thus in fact stopped further inquiry, he now sought to be removed; that there was, however, one letter, the handwriting of which Mr. Underwood did not deny, in which he expressed his wish to the secretary, to have his name removed from the list of the managing committee, on account of his engagements preventing attendance on the duties of a director. The learned counsel argued, that the order made by the Vice-Chancellor was not authorized by the terms of the notice of motion, and ought to be discharged. He cited *Gay's case*, 1 De Gex, M. & G. 347; s. c. 10 Eng. Rep. 34.

*Roxburgh*, followed on the same side.

*Wigram, Bacon, Selwyn, and Little*, for the parties to the compromise.

*Craig and Webb*, for Mr. Underwood, contended, that that gentleman had permitted his name to remain upon the list of the provisional committee, believing that, by the then state of the law, he was liable as a contributory; but as the House of Lords, in *Hutton v. Upfill*, 2 H. L. Cas. 674, s. c. 1 Eng. Rep. 13, had determined otherwise, and had thus altered the law, he was entitled to the benefit of that decision, and was authorized to withdraw the consent, which had been given upon the authority of what had since turned out to be erroneous; that it was an untrue representation that Mr. Underwood had taken an active part in the affairs of the company, for in point of fact he knew nothing about the company, until it became involved in difficulty, and then he paid the money that he had paid, for the purpose of getting rid of the concern, although he remained upon the list in the hope of having a return of his money, or a part of it; that the compromise which was complained of by Mr. Underwood, was one which the Master was not authorized to enter into, for it was a compromise, not of a right, but part of a right, and therefore not

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binding upon the contributories, who were not included in that arrangement; and besides this, that the compromise was entered into without notice having been given to Mr. Underwood; that with regard to so much of the order of the Vice-Chancellor, as was not asked by the notices of motion before him, that ought not to work any mischief to the respondent; and that if the official manager, as appeared by the affidavits, had exercised proper vigilance, there would have been no necessity for any call. They complained that the list of contributories had been in many respects improperly made out, and was, in point of fact, no list at all, as not being a document which the act of parliament required; but that, such as it was, from that list the name of Mr. Underwood ought to be removed.

They cited the following cases: *Beseley's case*, 2 Mac. & G. 176; *Crosfield's case*, 2 De G. M. & G. 128; s. c. 13 Eng. Rep. 284; *Wryghte's case*, Ibid. 636; s. c. 13 Eng. Rep. 182.

[KNIGHT BRUCE, L. J. Is Mr. Underwood ready to repay to the contributories who entered into the compromise the 120*l.* each, which they paid? If he be not, then it is the opinion of my learned brother and myself that the compromise cannot be interfered with at Mr. Underwood's instance.

TURNER, L. J. The parties to the compromise are entitled to be placed in their former position, if Mr. Underwood seeks to set it aside.]

*Craig* not being ready at that time to answer the question put by the court, the argument was continued,—confined, however, to the points whether the order for the call should or should not be discharged, and as to the costs, both before the court below and on appeal, this limitation of the argument having been directed by their lordships after conferring together. At the conclusion, Mr. *Craig* stated that Mr. Underwood was willing to repay, and ready at once to do so, the 600*l.* paid by the five contributories who joined in the compromise; or he would, if their lordships thought right, pay that sum into court without prejudice, if they should consider that the compromise should not be set aside.

KNIGHT BRUCE, L. J. The order before us is the result of an anxious endeavor of one of the learned judges of the court towards doing substantial justice in a case of considerable complication, and possibly one of some considerable vexation. The motion is one which may be described as one which never ought to have been brought before the court. His Honor's order appears, at least, to be so likely, from the circumstances before us, to be agreeable to what may be called the moral merits of the case, that it is not without considerable regret that I find myself bound by the rules and practice, from which we are not at liberty to depart, respectfully to dissent from what he has done. Certain notices for different objects were brought before his Honor for discussion, and on the discussion certain parties were necessary to be present, or to be put in default for not being present; but upon the discussion, such parties were

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unrepresented. It is, I apprehend, a rule of this court, which the court is not at liberty to depart from, that when there are parties who are so unrepresented, who being served do not appear, the terms of the notice of motion cannot, so far as such parties are interested, be materially departed from. However the order of the Vice-Chancellor may be right in point of moral justice, it exceeds the rule I have mentioned, for it affects the interest of necessary parties, and, as his Honor's order goes undeniably beyond what was asked, we must, therefore, treat this case as not affected by that order, and treat the notices of motion as now before us. The first object is to remove the name of Mr. Underwood from the list of contributories. If there be no list of contributories in existence, as has been argued by Mr. Underwood's counsel, there is no list from which to remove his name; and if there be a list, or if there be the means of making a list, Mr. Underwood has shown no reason why his name should not be there. It appears that the contest, very disagreeable in its nature, commenced as early as January, 1851, whether Mr. Underwood ought to be treated as a contributory. The contest was as to a letter which Mr. Underwood said he did not write, and swore he did not write. It was, as appears, written at a club, and sealed with the seal of the club, to which Mr. Underwood is said to belong. After some dispute, and for reasons stated by him, Mr. Underwood consented to be placed upon the list, or to be placed upon it when prepared. The first notice of motion was more than three years after this month of January, 1851, and seeks on the ground of — not a change in the law, that being a wrong expression — but a change in the view of the law on the part of those who have to administer the law, that this conduct of his should go for nothing. Considering the particular facts of the case, and seeing the cases which have happened, and as it was possible that Mr. Underwood might have a benefit, I think it would not be a discreet exercise of our duty if in the year 1854 we varied his position, and that part, therefore, will be refused. As to the subject, involved in some degree of obscurity, and one on which my mind is not quite clear, namely, that of the compromise, by which five of the members of the association were, upon the payment of 120*l.* each, released from all liability, against the wish of the official manager, but sanctioned by the Master and acted on — we are of opinion that, whatever may be thought of the compromise, unless there is a production of the money paid by these five gentlemen, that arrangement cannot be disturbed; but that difficulty is removed, as Mr. Underwood now offers to pay the amount if the court thinks it right to discharge the order of the Master for the compromise. On that point the case has not been fully argued; but if Mr. Wigram and Mr. Selwyn had been heard, the doubt upon my mind might have been removed as to the propriety of that order having been made. My learned brother, however, is quite satisfied that the compromise ought not to be disturbed. It could not be disturbed without the concurrence of both of us; and that being so, and my doubt being no more than a doubt — and, as I said before, probably it would have been removed by the arguments of Mr. Wigram and Mr. Selwyn, if they had been

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heard upon the point — I think it right to concede and to agree that the order for the compromise ought not to be disturbed. The next question is as to the call, which has been impeached on various grounds. The original order to wind up this company was made in 1849, and there was no application to the Vice-Chancellor or here to discharge it, and, therefore, whatever suspicions may be entertained of the propriety of that order being made, it cannot — whether likely or unlikely on a proper occasion to be disturbed — be, on the present occasion, looked into or questioned. So, touching the original order, some costs must have been incurred which must be provided for. On the assumption, as I have said, of the order standing, a call there must be, and the difficulty we both feel is whether there is any such list of contributories made out as the act of parliament requires. The only list produced to us is one consisting of a column of names with words written in pencil — a circumstance wholly at variance with the notion of a record — and against the name of Mr. Underwood is written the word “adjourned” a word which must apply, I suppose, to the question of his liability, unless it refers to the letters and deeds also mentioned in the document being adjourned, which seems not likely. But it is said that elsewhere in the proceedings his name appears as settled on the list, but this cannot render it such a record as it would be safe to act upon. We are both of opinion that this is not such a list as the act of parliament requires. That, however, is not the only objection to this catalogue or coalition, for there appears the name of another individual whose case stood adjourned. If the winding-up order is to stand, some call must be made; and the rules of the court, the demands of justice, and the interests of society, require that the list before us should not be treated as one authorized by the act of parliament, and that so much of Mr. Underwood’s demand asking the discharge of the order for the call should be acceded to. The motion will in all other respects be refused. It is, I believe, the opinion of both of us that, in the circumstances of this case, there should be no costs of this application given to Mr. Underwood; that he should pay the costs of the persons who were parties to the compromise, and that the costs of the official manager and of the other parties should be paid out of the estate.

TURNER, L. J., entered very fully into a detail of the circumstances of the case, and observed that the winding-up acts had been, both by judges and by the legislature, too indiscriminately applied to unformed and abortive companies; but that the act of the legislature, coupled with the judicial decisions of the highest tribunal of appeal, were such as to leave the court no liberty of questioning the fact of such half-formed schemes falling within their operation. Much stress had been laid in the argument, and had been relied on by the Vice-Chancellor, upon the doing of substantial justice, in opposition to the notion of technicality, and there seemed to be a growing practice of treating any objection to a departure from the rules and practice of the court as a resort to technicality in order to defeat substantial justice; but if parties would take the trouble to look into the reason

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why the court had established technical rules of practice, they would find that its object was to enforce substantial justice in opposition to evasion, and for the very purpose of preventing substantial justice from being defeated. If ever there were a case in which the strictest rules of practice ought to be adhered to, it was the case before the court, and he wholly agreed with his learned brother on the point of costs, and which related to the costs below as well as here.

## JENNINGS v. BROUGHTON.

December 8, 9, 10, 20, and 21, 1853, and March 30, 1854.

*Vendor and Purchaser — Mining Shares — Relief from Contract.*

Where a purchaser of shares in a mine had not relied upon the representations of the vendor as to the value of the mine, but had himself inspected the mine, the Master of the Rolls refused to relieve him from his contract: —

*Held*, on appeal, that as, upon the evidence, there was no proof that the representations made by the defendants were untrue assertions, which, if taken as true, would have added to the value, nor that these representations were merely conjectural, the plaintiff was not entitled to relief in equity, but that his bill must be dismissed without prejudice to any action he might be advised to bring.

THIS was an appeal from a decree of the Master of the Rolls. The case is reported at length, 22 Law J. Rep. (N. S.) Chanc. 535; s. c. 19 Eng. Rep. 420. The plaintiff appealed. The arguments lasted several days, but no recapitulation of the facts is necessary. At the desire of one of their lordships, the appellant's counsel handed in a statement of the points upon which the plaintiff alleged that untrue representations had been made, which were as follows, relating to the report of the 19th of August; that it was untrue that there was such view on the 16th of August, as therein mentioned; that it was untrue in representing four levels as existing works; that it was untrue in representing No. 1 as yielding, in a distance of ninety yards, 60 tons of ore; also untrue in representing the other characteristics of No. 1 as then existing, particularly as to the masses of 3 cwt. to 4 cwt.; untrue, also, in representing the discovery of No. 4 level at that state of the workings; also untrue as to the body of solid ore 24 inches wide, resting on a vein 3 feet wide, continuing the same width and characteristics for 17 yards; also untrue that there was any No. 4 level except a worked-out level; untrue, also, that there was any level driven on a parallel vein; also untrue that there was any parallel vein; as to No. 2 level untrue in this, that there was shown a quantity of solid ore in lumps; also untrue that 6 tons had been taken from an open trench 12 inches wide, &c.; and that as to the advertisement in the Mining Journal, it was untrue that a vein containing solid ore 2 feet wide had been proved for 10 fathoms; untrue that such a vein had been intersected by three levels; untrue that at that time there

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was being worked a parallel vein, or that it was beginning to show ore of great promise; untrue as to the extracting solid blocks of ore from three to four hundred weight; untrue that the ore was selling at 12*l.* a ton; and untrue that there was a stock of fifty tons on bank, as stated in that advertisement.

*Willcock, James, and Harrison*, were for the appellant.

*Palmer, Kenyon, and Giffard*, supported the decree of the court below.

*Willcock*, was heard in reply.

*March 30, 1854.* Their lordships delivered separate judgments, entering at very great length into the facts of the case, and containing a minute dissection of the evidence.

Knight Bruce, L. J., remarked that as the plaintiff made visits to the mines before he purchased the shares, or a portion of them, (and if he had not done so it was of his own choice to abstain, although it appeared that he did so,) and as it appeared that he saw all that lamp or candle could disclose to him, it was by no means a matter of surprise that the Master of the Rolls was not satisfied that the plaintiff had relied on any other information than what he derived from his own inspection. Three questions arose: first, whether in the statements concerning the mines, published by the defendants, there were any untrue assertions, which, if taken as true, added to the value, and were not conjectural merely? secondly, was any such statement made without belief in its truth by those making it? and, thirdly, was the belief entertained without fair grounds. If the first of these points were decided against the plaintiff, the other two would become immaterial; but, if the first was decided in his favor, still, if the court was against him on the other two, his case must fail. He (Lord Justice Knight Bruce) was against the plaintiff, although, as to the first of the three questions, he entertained some doubt, but the proof rested with the plaintiff; and on the second and third he was against the plaintiff. The result was, that the bill must either be dismissed, or there must be an examination of witnesses in court. It was, however, thought better, seeing that the plaintiff might by an action recover damages, and looking at the nature of the question, to dismiss the bill, inasmuch as by an action the plaintiff could obtain justice, if he had not already obtained it.

TURNER, L. J., added, that the decision turned upon the merits of the case, and had no reference to any question of form or jurisdiction; and that the bill would be dismissed without prejudice to the plaintiff bringing an action if he should be so advised.

*In re CLERK OF RECORDS AND WRITS.*

June 3, 1854.

*Practice — London Commissioners — 16 & 17 Vict. c. 78, s. 2, Construction of.*

The words "at their respective places of business," in the 2d section of the 16 & 17 Vict. c. 78, are not to be construed as defining the place where the oath is to be administered, but the area within which the solicitors are to be considered as practising.

THE clerk of records and writs had refused to file an affidavit, on the ground that it was sworn in the accountant-general's office, and that it ought to have been sworn "at the place of business" of the commissioner, according to the provisions of the 16 & 17 Vict. c. 78, (The Oaths in Chancery Act.) The 2d section of that act was as follows: "It shall be lawful for the Lord Chancellor, from time to time, to appoint any persons practising as solicitors within ten miles from Lincoln's Inn Hall, at their respective places of business, to administer oaths and take declarations, affirmations, and attestations of honor, in chancery, and to possess all such other powers and discharge all such other duties as aforesaid; and such persons shall be styled 'London commissioners to administer oaths in chancery;' and they shall be entitled to charge and take a fee of 1s. 6d. for every oath administered by them, and for every declaration, affirmation, or attestation of honor taken by them, subject to any order of the Lord Chancellor varying or annulling the same."

*Follett* now moved that the clerk of records and writs be ordered to file the affidavit.

*Taylor*, for the Suitors' Fee Fund, contra, contended that if the words "at their respective places of business" were not to be held as denoting the place where the oath was to be administered, then a London commissioner might administer an oath at any distance from London; and that such a construction would do away with the marked distinction which it was obviously the intention of the act to make between London and country commissioners.

THE LORD CHANCELLOR (LORD CRANWORTH) was of opinion that the words "at their respective places of business," must be referred to "persons practising as solicitors," whose place of business for such practice was within ten miles of Lincoln's Inn Hall; otherwise, if a party were sick and unable to leave his house, he could not be sworn at all. And, again, if the oath could only be administered at the solicitor's place of business, it could not be administered to parties other than his own clients. His lordship was of opinion that such could not have been the intention of the legislature, and that it was

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Morritt v. Walton.

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more reasonable to consider the words in question as denoting the range within which solicitors were to be considered as practising; and he ordered the affidavit to be filed.

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MORRITT v. WALTON.

July 1, 1854.

*Practice — General Order of the 23d of October, 1852 — Costs of Appearance.*

A solicitor was held entitled to charge 6s. 8d. for every three defendants to a bill for whom he entered appearances, although such appearances were entered for all the defendants on the same day. The scale of fees, as to entering appearances, set forth in the fifth general order of the 23d of October, 1852, was not intended to be confined to appearances to a summons.

THE suit in this case was commenced by bill. There were sixteen defendants, for all of whom one solicitor entered appearances on one and the same day. Under the old practice, a solicitor, entering an appearance for any number of defendants on one and the same day, could only charge one item of 6s. 8d. The fifth of the general orders of the 23d of October, 1852, after giving a scale of fees for various matters relating to proceedings commenced by summons, was as follows: "For entering the appearance for one or more defendants, if not exceeding three, 6s. 8d. If exceeding three, for every additional number, not exceeding three, an additional sum of 6s. 8d." In his bill of costs, the solicitor had charged 6s. 8d. for every three defendants; but the taxing master had disallowed all but one charge of 6s. 8d., on the ground that the above-mentioned order referred only to proceedings commenced by summons.

*Smythe*, for the solicitor, submitted that the order ought to be construed liberally, so as to extend it to proceedings by bill as well as by summons; and that no good reason could be given why it should be confined to the latter case.

THE LORD CHANCELLOR, (LORD CRANWORTH.) If the order is not general in its terms, it certainly ought to be; for no assignable reason can be given for making a difference between the two kinds of proceeding. I think, therefore, the order ought to be construed as establishing a general rule. The order, however, I now make must be understood to be a special order in this particular case.

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Newberry v. Benson.

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## NEWBERRY v. BENSON.

July 13, 1854.

*Practice — Evidence — Costs — Procedure Amendment Act.*

Where, under a decree directing accounts to be taken, no order was obtained under the 54th section of the statute 15 & 16 Vict. c. 86, that the books of account should be taken as *prima facie* evidence, but the judge's chief clerk so admitted them and granted his certificate, the Court of Appeal, upon a motion to discharge the certificate, refused the same, but without costs.

In the above-named suit a decree was made for the administration of the estate of the late William Newberry. The accounts were taken by the chief clerk of the Master of the Rolls, who admitted certain books of account as *prima facie* evidence of the truth of the matters therein contained, pursuant to the 54th section of the Procedure Amendment Act, although the evidence of those books was objected to. He granted his certificate, and the Master of the Rolls refused to disturb it. On the latter occasion, no mention was made of the omission to obtain the order under the 54th section, and, therefore, the motion was renewed here to vary or discharge the certificate. The argument was wholly unsuccessful, and the appeal was dismissed.

*Willock* and *Bristowe*, for the motion.

*Bagshawe* asked for a dismissal with costs.

[TURNER, L. J. The chief clerk has no authority to receive such books as *prima facie* evidence without an order. Was that order obtained?]

*Bagshawe* admitted that it was not.

TURNER, L. J. This motion cannot be supported, and the appeal must, therefore, be dismissed. Under ordinary circumstances that dismissal would, of course, be with costs. Here, however, it is admitted that no order was obtained, yet the chief clerk proceeded to admit the books as *prima facie* evidence of the truth of the accounts therein contained, and, therefore, the motion will be refused, without costs.

*Bythesea v. Bythesea.*

## BYTHESEA v. BYTHESEA.

January 13 and 14, and August 2, 1854.

*Will, Construction of— Vesting.*

Testatrix, by her will, gave her residuary estate to trustees to invest and pay the dividends to A for life; and after his decease, in case he should leave a child or children, in trust for all and every such child or children equally at twenty-one, the share of each such child to be considered a vested interest in him or her; and, in case A should leave no such child or children, the will contained a gift over to third parties. A, had one child, H. E. F., who attained twenty-one, and died in his father's lifetime, leaving a widow and child surviving him. On a suit by the widow of H. E. F. claiming, as his administratrix, that he was absolutely entitled to the fund:—

*Held*, upon appeal, affirming the decision below, that the persons claiming under the gift over were entitled.

THIS was a special case under the 13 & 14 Vict. c. 35.

Ann Whittaker, the testatrix, by her will, dated the 18th of January, 1798, bequeathed all the residue of her personal estate to trustees, upon trust to invest the same, and then upon trust, *inter alia*, to pay unto her grandson Henry Frederick Bythesea, the dividends thereof during the term of his natural life; and from and after the decease of her said grandson, in case he should leave any child and children of his body lawfully begotten, then in trust for all and every the child and children of her said grandson lawfully begotten, equally between them, if more than one, share and share alike as tenants in common, and not as joint-tenants; and if there should be one such child, then in trust for such only child, to be paid and payable to such child or children at his or their age or respective ages of twenty-one years; and the said testatrix declared it to be her will, "that the part or share of each such child or children should be considered a vested interest or vested interests in him, her, or them respectively," and from and after the decease of her said grandson, in case he should not leave any such child or children, then in trust, if Elizabeth Langley should be then living, to pay the whole of the dividends to her, for and during the term of her natural life; and from and after the decease of the said Elizabeth Langley, and also of the said H. F. Bythesea without leaving issue aforesaid, then upon certain trusts over. H. F. Bythesea had a child, Henry Edward Frederick, who attained his age of twenty-one years and died intestate, in the lifetime of his father, leaving the plaintiff, Mary Ann Bythesea, his widow, and a child, now living, him surviving. H. F. Bythesea and E. Langley were both dead before the institution of the suit, which was by the said Mary Ann Bythesea, claiming the fund as administratrix of the said intestate, and was against the personal representatives of the testator and also the personal representatives of the legatees under the will.

The cause came on for hearing, before Wood, V. C., who held that the gift over took effect. The plaintiff appealed from this decision.

Bythessa v. Bythessa.

*Chandless* and *Shapter*, for the widow, the appellant. Where the words of a will are ambiguous, the court will put such a construction upon them as will effectuate the intention of the testatrix. The intention that the children should take in all events, is evident from the direction, that the share of each child should be considered a vested interest. The court, under these circumstances, will construe the word "leaving" as "having;" otherwise, the direction as to the vesting will be superfluous and unmeaning. The testatrix having placed herself *in loco parentis*, the court will construe the will liberally, as in the case of a settlement: and the word "children" will be held to extend to "issue." *Hedges v. Harpur*, 9 Beav. 479; *Woodcock v. The Duke of Dorset*, 3 Bro. C. C. 569; *Hope v. Lord Clifden*, 6 Ves. 499; *Powis v. Burdett*, 9 Ibid. 428; *Howgrave v. Cartier*, 3 Ves. & B. 79; *Perfect v. Curzon*, 5 Mad. 442; *Maitland Chalie*, 6 Ibid. 243; *Whalford v. Moore*, 3 Myl. & Cr. 270; *Clayton v. The Earl of Glen-gall*, 1 Dr. & W. 114; *Farrer v. Barker*, 9 Hare, 737; s. c. 15 Eng. Rep. 239; *Ex parte Hooper*, 1 Drew. 264; s. c. *nom. In re Tookey's Trust*, 11 Eng. Rep. 60; *In re Thompson's Trusts*, 5 De Gex & Sm. 667; s. c. 15 Eng. Rep. 498; *Oddie v. Woodford*, 3 Myl. & Cr. 584; *Torres v. Franco*, 1 Russ. & Myl. 649; *Murray v. Jones*, 2 Ves. & B. 313; *Cole v. Sewell*, 2 H. L. Cas. 186; *Scott v. Scott*, Amb. 383; *Sibley v. Cook*, 3 Atk. 572; *In re Bartholomew's Trusts*, 1 Mac. & G. 354.

*Roll* and *Faber*, for the defendants claiming under the limitation over. If there were inconsistent expressions in the will, the court might allow a greater latitude of interpretation; but where the expressions are free from ambiguity, the court will not do violence to the words for the sake of effectuating what is called the paramount intention. The cases upon marriage settlements will not apply to questions arising upon wills, where the subject is matter of bounty merely. *Kimberly v. Tew*, 4 Dr. & W. 139, 150.

*Hall* and *Webb* appeared for other parties.

*Chandless* replied.

*August 2.* The LORD CHANCELLOR, (LORD CRANWORTH.) This special case was argued before us some time since, but, from accidental circumstances, it has remained undisposed of. The will in this case has provided for two contingencies: the one, that of H. F. Bythessa, the grandson, leaving a child or children; the other, that of his not leaving any child. *Prima facie*, leaving children means leaving children at the period of death; and if this construction is adopted, the second contingency has happened upon which the property was given over. For the plaintiff, however, it was contended that the first contingency has, in fact, happened; for that in this case "leaving" must be construed as "having children;" for that the testatrix could not be held to intend that the gift to the children should depend on the accident of some or one of them surviving their father.

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The answer to this is, that the words of the will are clear and unambiguous. It may be impossible to explain why the testatrix should have made such a disposition; but, nevertheless, she was at liberty to do so. But, then, reliance was placed upon the direction that the share of each child should be considered a vested interest. The answer to that is, that that direction may apply only to the contingency happening, of H. F. Bythessea leaving a child surviving. The fact may be, that the testatrix did not contemplate the event which has happened; but if she had, it does not follow she would have done what is now contended for, namely, substituted the word "have" for "leave;" for in that case a child, dying an hour after its birth, would have taken the whole. It remains, therefore, to examine the authorities. *Woodcock v. The Duke of Dorset*, was the first case cited: and that was the case of a settlement. It appears, from the note in 3 Ves. & B. 83, that the trusts of the settlement are not correctly reported; but, even taking them to be rightly reported, it is obvious the decision went on a ground not applicable to the present case. Lord Thurlow, in that case, says: "The intention of the settlement is the truth and honor of the case." But here, the question is upon a will, which is mere matter of bounty, and the language of the will is our only guide. The next case cited was *Hope v. Lord Clifden*, where Lord Eldon, following the reason of Lord Thurlow, provided for a child, though he felt that he was doing some violence to the words of the settlement. *Powis v. Burdett*, was before the same judge, and decided upon the same principle. In *Howgrave v. Cartier*, a similar question came before Sir W. Grant, who, relying on previous authorities, decided in a similar way. All these were cases upon marriage settlements; but it was contended that the same doctrine has since been applied to cases upon wills. In *Maitland v. Chalie*, before Sir J. Leach, there was a previous gift to all the children who should attain twenty-one; and the Vice-Chancellor relied upon this. Next, the cases *In re Thompson's Trusts*, and *Kimberly v. Tew*, were cited. In the former of these cases, as in the case before Sir J. Leach, there was a clear gift vesting the property in the children in the first instance. In the latter case, Lord St. Leonards remarks that wills are to be construed on different grounds from settlements, but that in the case before him, he had no hesitation in holding that the children took vested interests, and that the event, on which the gift over was to take effect, did not happen. None of the cases cited warrant the construction contended for by the appellant; and to adopt such a construction would be to carry conjecture further than has been done in any previous case.

TURNER, L. J. The question is, whether H. Edward Frederick became absolutely entitled to the testatrix's residuary estate. I concur with the Vice-Chancellor that he did not. In the absence of authority, the case was felt to be too plain for argument; but in the cases of provisions for children, it was contended that the courts have construed interests to be vested, which in other cases would be only contingent. Two classes of authorities were relied on: first, cases

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relating to portions, from *Woodcock v. The Duke of Dorset* downwards; and, secondly, cases in which the courts have construed the word "leaving" as "having." As to the first class, with one or two exceptions, they were cases upon marriage settlements, and not upon wills. The existence of marriage settlements, *per se*, proves an intention to provide for children generally; but a will is arbitrary in its nature, and such may be, or may not be, the intention. In both cases, the question is one of intention; and in a will so framed as to show an intention to provide for children, the principle may be properly applied; as in *Tucker v. Harris*, 5 Sim. 538; and in *Kimberly v. Tew*. But, assuming this to be the case of a settlement, I do not think the argument of the appellant would be much further advanced; for the authorities justify me in saying, that the cases on settlements have been carried as far as they should be; and I think the present case is distinguishable from the previous cases for two reasons: first, that, in all the previous cases, the settlement contained some provisions inconsistent with the notion that the gift was to depend on survivorship; while in the present case, the provisions are throughout contingent. But it was argued against this, that effect must be given to every word of the will; and that, unless the word "leaving" was construed as "having," the direction as to vesting would be mere surplusage. *Oddie v. Woodford*, which was much relied on for this purpose, merely shows that every word is to have effect, "if the context, and provisions, and nature of the will" require it. But, there is further ground for saying that, to adopt the construction here contended for, would be to extend the principle: that is, that in all the cases the question has arisen between the eldest son and the other children, or between the surviving children and the representatives of deceased children; and in none of the cases, that I am aware of, has there been a limitation over in favor of third persons. The existence of this goes far to destroy the foundation of the argument. The other class of cases are those in which the question has been, whether a clear vested interest is to be cut down by words importing a contingency. These cases have no application to a case where the whole disposition is introduced by words importing contingency.

*Appeal dismissed, without costs.*

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*Ex parte* THOMAS HODGSON; IN THE MATTER OF THOMAS HODGSON,  
A BANKRUPT.

June 10 and 11, 1853.

*Certificate—Compounding with Creditors.*

A trader, who was not engaged in any business, except as the owner of two small sailing vessels, kept no regular accounts. He contracted with a ship-builder for the repair of one of the vessels, and the amount claimed for the repair was far beyond the contract price,

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by reason of some alterations alleged to be beyond the contract. Cross actions were brought, and settled by arbitration. The trader left England in a feeling of irritation at the result of the proceedings, and was declared bankrupt on the petition of the ship-builder. He had on a former occasion compounded with his creditors, paying them less than 1*s.* in the pound, but had been forced into this proceeding by misfortune: —

*Held*, that the bankrupt's conduct in quitting England was highly censurable, but would be sufficiently punished by suspending his certificate for twelve months, and allowing it to be one of the second class.

Under the present act, the court will not universally refuse a certificate protecting the bankrupt's property, merely because he has on a former occasion compounded with his creditors, and paid less than 1*s.* in the pound.

THIS was the petition of the bankrupt, appealing from the decision of the commissioner, giving to the appellant only a certificate of the third class, with the condition that such certificate should not protect his after-acquired property, as against the debts which he then owed.

The petition, and the affidavit of the bankrupt in support of it, stated, in substance, as follows:—

In September, 1851, the bankrupt carried on business at Hull, as a ship-owner, but only had two small vessels called *The City of Lichfield* and *The Faugh-a-Ballagh*, and carried on no other business. He was possessed of a capital, which amounted (as appeared by his balance-sheet) to 2,475*l.* 2*s.* 2*d.* The bankrupt's mode of carrying on his business was by cash payments; and at the time aforesaid, besides a sum of 500*l.* and a sum of 300*l.*, both of which sums were secured upon mortgage, and both of which were duly deducted in the aforesaid estimate of the bankrupt's capital, he did not owe more than 150*l.*

In September, 1851, the bankrupt laid the vessel *Faugh-a-Ballagh* upon the ship-yard of Mr. Geo. Kell, a small ship-builder at Barton-upon-Humber, for some trifling repairs and alterations, (the vessel being at that time, exclusive of her stores, worth about 400*l.*)

Shortly after the vessel had been laid up, the bankrupt altered his original intention, (by the advice, as he alleged, of Mr. Kell,) and determined to have the vessel lengthened, and widened, and heightened.

A written contract, dated the 20th of September aforesaid, was accordingly prepared and executed by Mr. Kell and the bankrupt, whereby it was stipulated that the vessel should be lengthened, widened, and heightened, repaired, and improved, in the way thereby specified, for 300*l.*, which was to be paid by the bankrupt to Mr. Kell, on the completion of the work.

The bankrupt alleged, that Mr. Kell violated his part of the contract, in not completing the alterations in the vessel according to the agreement.

Mr. Kell, on the other hand, brought a cross-action against the bankrupt, claiming in respect of the contract, and extra work and alterations ordered by the bankrupt, and not included in the contract, 1,409*l.* 13*s.* 3*d.*

These actions, and an action of trover, brought by the appellant, to recover the ship, were all referred to arbitration; and on the 28th of July, 1852, the arbitrator being of opinion that the nature of the

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alterations had thrown open the contract, awarded to Mr. Kell the whole amount of his claim, less the sum of 79*l.* 5*s.* 1*d.*

When the bankrupt received notice of the arbitrator's award, he had only between 200*l.* and 300*l.* left, and, being unable to pay the amount of debt and costs awarded against him, left England in the middle of the month of August, to avoid being arrested, having first executed a general power of attorney, to his solicitor, to act for him in his absence, and did not return till the early part of February, 1853.

On the 2d of February, 1853, Mr. Kell filed his petition in the Court of Bankruptcy, and the bankrupt was thereupon adjudicated a bankrupt, on the 16th of the same month.

The certificate was opposed by Kell, but by no other creditor. The grounds of opposition were, that the bankrupt had been guilty of a fraudulent preference, in mortgaging his property to a Mr. Wells; that he had kept no books; that he had compounded with his creditors about seven years since; and that he had incurred unnecessary expenses in travelling and remaining on the continent.

With respect to the charge against the bankrupt, of having given a fraudulent preference to Mr. Wells, the bankrupt deposed that when he executed the securities in question, he not only did not contemplate bankruptcy or insolvency, or intend to diminish the sum to be divided among his creditors, but sincerely believed that, with the exception of his debt to the mortgagees, he did not owe 150*l.* in the world, not having the least expectation that the litigation in which he was engaged with Mr. Kell, could or would terminate in the way it did, but being, as he alleged, advised that his contest with Mr. Kell would end in the bankrupt's recovering a balance from him.

With regard to the circumstance of no books having been kept, the bankrupt deposed that he, being in no way of business except as aforesaid, was in the habit of paying ready money for every thing; and besides his mortgages, including those to Mr. Wells, and the claim of Mr. Kell, did not owe any debts at all, save trifling debts, amounting all together, at the utmost, to not more than 150*l.*

With regard to the fact of his having left England, and incurring expenses on the continent, the bankrupt admitted that the course he took was imprudent with reference to his own interests; but stated that, at that time, he did not suppose he was likely to become bankrupt; and that when he went and was remaining abroad, he was suffering deep mortification and distress at the result of the arbitrator's award, and was under a firm belief, (which he still entertained,) that the arbitrator had been misled by the evidence.

With regard to the circumstance of the bankrupt having, at a former period, compounded with his creditors, he deposed that the facts were as follows: In February, 1843, he commenced business, and The Tartar was the first vessel he purchased. Her career was very brief and peculiarly disastrous. The first voyage which she attempted, was to Archangel, and on her homeward voyage, from that port to Hull, with a valuable cargo on board, (part of which belonged to the bankrupt, and which cargo from some mistake was

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not insured,) the vessel was dismasted and abandoned. The value of the ship and freight, and of that portion of the cargo belonging to the bankrupt, was upwards of 1,500*l*. The ship was insured with the General Marine Insurance Company, for 1,000*l*. That office disputed the abandonment, and the bankrupt, dreading the risks of engaging in a legal contest with so wealthy an office, accepted 500*l*., offered to him, in full of all demands. He consequently lost full 1,000*l*., which was nearly half his capital, by his first adventure in shipping.

In 1844, the bankrupt purchased a schooner named *The Prince of Saxe Coburg*. This vessel he repaired and refitted at a very considerable outlay; but during the single voyage which she made whilst she belonged to the bankrupt, four accidents happened to her, and the loss arising therefrom was considerable. This so discomfited the bankrupt, that he determined to sell the schooner, and did so at a price very much below what he gave, and he thereby lost several hundred pounds by this vessel. In 1845, and early in 1846, the bankrupt made some purchases of tallow, linseed, cloverseed, and linseed cakes, and after the purchase the goods fell greatly in value, in consequence of the panic in the money market, which occurred at that time; and under the circumstances aforesaid, the bankrupt was obliged to call his creditors together in March, 1846, and they, knowing well how exceedingly unfortunate the bankrupt had been, most handsomely, and without an exception, accepted a composition of 5*s*. in the pound. The bankrupt borrowed the money required for making the payment; but, at the end of 1846, the bankrupt came into possession of a little property, upon the death of a near relative, and he then forthwith repaid the money borrowed.

*Rolt and Kinglake*, supported the appeal.

*Bacon*, for Mr. Kell, submitted that the decision of the commissioner was not more severe than the justice of the case required. • He cited *Ex parte Hollingworth*, 4 De G. & S. 44; s. c. 7 Eng. Rep. 303; and contended that on the authority of that case, and the principle on which the 6 Geo. IV., c. 16, s. 127, was framed, the certificate ought not to do more than protect the person of the bankrupt.

*Keller*, appeared for the assignees.

*Wells*, was examined, *vivâ voce*, as to his security.

KNIGHT BRUCE, L. J. In the particular circumstances before us, I find it difficult or impossible to understand why it was that Mr. Kell, the petitioning creditor, caused the bankrupt to be made a bankrupt, unless it was merely with the view of punishing him for misconduct, actual or supposed, towards that gentleman. Substantially there are not, nor was it likely that there would be, any assets. So that if the bankruptcy had been directly or indirectly of the bankrupt's own obtaining or seeking, (which certainly it was not,) he might have

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been open to more censure, than that to which he is, in the actual circumstances, open. The bankruptcy is, and from the beginning has been one altogether adverse to him. But as to his certificate, he was not before the learned commissioner, nor is he now, opposed, except by Mr. Kell, and the two assignees—of whom neither is a creditor, one being of course the official assignee, and the other having been nominated and chosen by Mr. Kell, who either would not or could not be appointed an assignee himself, but has proved a debt under the bankruptcy, not, however, so much in the whole as 80*l.*, though he claims, and probably with truth, to be a creditor of the bankrupt to an amount much larger. Mr. Kell holds, or claims to have a security or lien upon certain property in his possession that (subject to his security or lien, if any, and to another security, which seems alone enough to exhaust the value) belongs to the bankrupt's estate. The total amount of debts proved under the bankruptcy is less than 100*l.*, including what Mr. Kell has proved.

These considerations and the original examination before us, have reduced the case against the bankrupt, as to his certificate, to three points: first, his want of business-like habits, and seemingly of capacity for business; secondly, the absence of books and accounts, a head which may, perhaps, be hardly distinguishable from the first; and, thirdly, his conduct in going and living for five or six months abroad, where and as he did, after he had become aware of the nature of Mr. Temple's award.

With regard to the first point, the errors and mishaps which have thus arisen, have not been of such a nature as to lead to an inference of moral delinquency, or to be otherwise than usual. It is probable that all who dealt with him were well aware of the degree of his aptitude and capacity. The second point certainly deserved close attention, and required explanation. But, I think, that the particular and limited nature and character of the bankrupt's business, including, of course, the manner in which he seems to have employed his vessels, afford, if not a justification, some excuse in this respect, so as not to render it incumbent on us, with reference either to the specific merits of the individual case or to the interests of society, to visit his mode of acting so far with great severity. On the third point, however, I regard his conduct as open to much animadversion. He ought not to have gone abroad when and as he did. He ought not to have lived abroad at the rate of expense or in the manner that he did.

His proceedings have been censurable, but, considering the whole of the facts before us, I am of opinion, and I believe my learned brother also to think, that the demands of public and private justice here will be satisfied by suspending the certificate for a twelvemonth from the date of the petition for adjudication, by allowing it then of the second class without restriction or condition, and by granting the bankrupt protection as from the 11th of July next, but not during the intermediate time.

TURNER, L. J. I feel no doubt that some punishment is deserved by this bankrupt; the question is, what extent of punishment will

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satisfy justice. The effect of the judgment of the commissioner is, to deprive the bankrupt of the power of entering into trade, until he has paid all the debts which could be proved under the bankruptcy. I do not consider it to be in general consistent with good policy to allow a bankrupt to enter into trade, protecting his person, and leaving all his estate subject to be swept away under an execution issued by any creditor to whom he was indebted before his bankruptcy. Extreme cases may occur in which justice may require such a course to be taken; but it does not appear to me consistent with sound policy generally to grant certificates in such a form. With regard to the conduct of the bankrupt towards Mr. Kell, I feel no doubt that there was a *bond fide* belief, on the part of the bankrupt, that he was not indebted to Kell in the amount claimed. It is, however, said that the bankrupt made a composition with his creditors five years ago, and that the circumstance disentitles him to a certificate which will do more than protect his person. It appears to me, however, that the composition was rendered necessary by misfortune. It has been argued, on behalf of the respondent, that the certificate, in such a case, ought not to protect the bankrupt's property, by analogy to the provision in the act of Geo. IV., that where a bankrupt had compounded with his creditors, and had paid less than 15s. in the pound, his future assets were not to be discharged. I think, however, that this argument rather tends the other way, and that, from the omission of a similar provision in the present act, we may infer that the legislature considered such a punishment too severe to be inflicted in every such case.

Another charge made against the bankrupt is founded on the absence of accounts; but it is to be considered that this bankrupt was a ship-owner, having only two small vessels, and was not a trader in extensive business; and that the same importance does not attach to the absence of books in such a case as on one of general trading. His absence abroad is, perhaps, the least justifiable part of his conduct, but I think that it is rather to be attributed to angry feelings than to any settled principle of dishonesty. Although it cannot be justified, I think it is not sufficient ground for subjecting all his future property to his past debts. Upon the whole, it appears to me, that the measure of justice awarded by my learned brother, is the right one.

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*HAYNES v. HAYNES.*

February 19, 1853.

*Will—Construction—Priority between Legatees—Clear Annuity—Legacy Duty.*

A testator, after bequeathing two pecuniary legacies, bequeathed three "clear" annuities for the lives of the annuitants. He then bequeathed his residuary estate in trust to pay a

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clear annuity of 1,000*l.* to his widow, and upon trust, after payment of the four annuities, to pay the residue of the income during the life of the widow to A. The capital of the residue, after the widow's death, was to be held as to 5,000*l.* upon such trusts as the widow should appoint, and subject to her appointment the 5,000*l.* was to be held in trust for B, for life, and after her death to fall into the general residue; and subject to such disposition as aforesaid, and as to the residue of the testator's estate and effects after the widow's death, and subject as to the 5,000*l.* and the interest thereof as aforesaid, upon trust to pay certain legacies amounting to 18,000*l.*, with an ultimate residuary gift to E. And there was a direction that, upon the death of the several annuitants, the funds on which the annuities were secured should follow the ultimate destination of the residue:—

*Held*, 1. That the two first-mentioned pecuniary legacies and three annuities had priority over every other gift.

2. That the annuities were given free of legacy duty.

3. That the annuities were charged on the capital of the residue, but that A was entitled to retain the surplus income paid to her in one year, and to receive the surplus for another, although the income was in the subsequent years insufficient to answer the annuities.

4. That on the death of an annuitant in the lifetime of the widow, the ultimate residuary legatee did not become at once entitled to the fund set apart to answer the annuity.

5. That after the widow's death, the 5,000*l.* would have no priority over the other reversionary legacies.

6. That the reversionary legatees were not entitled to have any surplus income, during the widow's life, set apart to secure payment of their legacies.

THIS was a special case, which by leave came on to be heard in the first instance, before the lords justices, for the purpose of determining the construction to be put upon the will of Edmund Haynes.

By the will, dated the 30th of December, 1845, the testator, after directing payment of his debts and funeral and testamentary expenses, bequeathed a legacy of 19*l.* 19*s.* to his brother, and bequeathed to Elizabeth Haffey Reed the sum of 3,500*l.* He then gave and bequeathed unto his wife, her executors, administrators, and assigns, all his household goods, furniture, books, plate, wines, linen, and china, horses, carriage, and effects of every description which should be in, or upon his dwelling-house and premises at the time of his decease absolutely. And he bequeathed unto Mrs. Anna Isabella Anderson, for her life, a clear annuity, or yearly sum of 100*l.*; and he bequeathed unto his sister, Dorothy Haswell, for her life, a clear annuity, or yearly sum of 30*l.*; and to his sister, Ann Ellcock Walton, for her life, a clear annuity or yearly sum of 70*l.*; and he directed the same several annuities to be paid on the 1st of September in each and every year during the lives of the respective annuitants, by his trustees and executors thereafter named; the first payment of the said annuities to be made on such 1st day of September as should occur next after his decease. And he devised and bequeathed all that his dwelling-house, gardens, stables, and premises in which he then resided, situate at Summerland Place, together with all the rest, residue, and remainder of his real and personal estate, whatsoever and wheresoever, and of what nature, or kind soever, unto the plaintiff, his heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon trust, in the first place, out of the moneys which should come to his or their hands, to set apart and appropriate a sufficient part thereof, or fund, in the names, or name of his said trustee, to raise and pay unto his wife one clear annuity, or yearly sum of 1,000*l.*, by equal proportions quarterly, during her life, on the four most usual

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days of payment of rent in the year, the first payment thereof to be made on such of the said days as should occur next after his decease; but no proportion of the said annuity was to be payable for the days of the current quarter which should have elapsed from the date of the last payment to the day of the death of the said annuitant. And he thereby gave and bequeathed the said annuity, or yearly sum of 1,000*l.* to his said wife during her life accordingly. And after full payment and satisfaction of the aforesaid four annuities thereinbefore given, upon trust to pay all the surplus, or residue of the annual interest, income, and dividends arising out of the residue of his said estate and effects during the lifetime of his wife unto Ann Elvira Reed and her assigns absolutely. And from and immediately after the decease of his wife, as to the sum of 5,000*l.* sterling, part of the principal, or residue of his estate and effects, upon trust that his trustee should pay and apply the said sum of 5,000*l.*, or any part thereof, to such person and persons and in such manner and form as his wife by any deed or deeds, or by her last will and testament in writing, should direct or appoint, give, or bequeathe, the same or any part thereof, or for want of any such direction or appointment, gift, or devise, and so far as any such, if incomplete, should not extend, and as to such parts thereof as should remain undisposed of by his wife, upon trust as to the annual interest and dividends of the 5,000*l.*, and he gave and bequeathed the same interest and dividends unto Elizabeth Reed, for her life; and as to the principal sum of 5,000*l.*, he directed that the same should go with and become part of his residuary estate and effects after the death of the survivor of them his wife and Elizabeth Reed, subject to such disposition thereof by his wife as aforesaid; and as to the remainder of the said principal, or residue of his estate and effects after the decease of his wife, (but subject, nevertheless, to the annuities to Mrs. Anderson, Mrs. Haswell, and Mrs. Ann Elcock Walton as aforesaid, and also subject as to the said 5,000*l.* and the interest thereof, subject as aforesaid,) upon trust that his trustee might and should pay, and he thereby gave and bequeathed the same as follows, that was to say: To his nephew Freeman Oliver Haynes, the sum of 2,000*l.*; to the aforesaid Elizabeth Haffey Reed, the sum of 9,000*l.*; to the defendant, Jane Morris Reed, the sum of 1,000*l.*; to the defendant, Lucy Haynes Reed, the sum of 2,000*l.*; and to the defendant, Frances Haynes Reed, the sum of 1,000*l.*; to the defendant, Haynes Walton, the defendant, Dorothy Walton, Charlotte Brown, and to Henry Haynes Walton, the sum of 1,000*l.* each. And, subject as aforesaid, he gave, devised, and bequeathed all the rest, residue, and remainder of his estate and effects, both real and personal, whatsoever and wheresoever, unto Elizabeth Haffey Reed, her heirs, executors, administrators, and assigns absolutely. And he thereby directed and requested that the dwelling-house and premises might not be sold, or disposed of in the lifetime of his wife, without her consent; but after her decease, and in case he should not leave sufficient moneys behind him to enable his trustees and executors to discharge the several annuities and legacies so given and bequeathed as aforesaid, then he thereby directed and empowered his trustees and executors

to sell his dwelling-house, gardens, stables, and premises, either by public auction, or private contract, as they might think proper, and pay and apply the proceeds arising from such sales, or so much thereof as should be necessary for the same, towards the payment of the same annuities and legacies respectively. And if the whole of such proceeds should not be consumed in such payments, then he thereby directed that the overplus, if any, should fall into and be considered as part of his residuary estate and effects, and go and be applied as in and by his will was directed. And he directed and requested that none of the funds, investments, or securities in which his property might be invested at the time of his decease might be altered, varied, or changed during the lifetime of his wife without her consent; yet with her consent it was his will that the same should and might be altered and changed as she might, with the consent of his trustees, direct. And he thereby directed that upon and after the death of the several annuitants, and the consequent cesser of the annuities, the several parts, or funds upon which the same were, or was respectively invested or secured, or out of which the same were, or was respectively payable, should follow the ultimate destination of the residue of his said estate.

The actual income which had arisen from the testator's estate during the first year from his decease amounted to 1,298*l.* 1*s.* 6*d.*, (after deducting income tax,) and the four annuities given by the will, (after deducting income tax,) amounted to 1,165*l.*, so that during the first year there was a surplus income of the testator's estate amounting to 133*l.* 1*s.* 6*d.*, which was at the expiration of the year paid, (less the legacy duty,) to Ann Elvira Reed.

In the month of November, 1847, a mortgage debt of 3,000*l.*, forming part of the assets, was paid off by the mortgagor, and produced the net sum of 2,850*l.*, which sum, with the concurrence of the testator's widow, was invested by the plaintiff in the purchase of three per cent. consolidated bank annuities.

On the 2d of May, 1848, being the expiration of the second year from the testator's death, there was a surplus income, after payment of the annuities less the income tax, amounting to 51*l.* 8*s.* 11*d.*, which was retained in the hands of the plaintiff.

At the expiration of the third year there was a deficiency of income to pay the several annuities by 146*l.* 2*s.* 3*d.*, and in the fourth and fifth years the income was deficient by the respective sums of 361*l.* 12*s.* 9*d.*, and 408*l.* 19*s.* 3*d.* to answer the annuities.

No parts of the testator's estate were ever particularly set apart or appropriated for payment of the annuities given by the will, but the annuities were paid by and out of the general income of the testator's estate so far as the same extended.

The income for the testator's estate ending in May, 1852, again proved insufficient to pay the annuities in full, the deficiency in that year amounting to 305*l.* 11*d.*, which deficiency, as well as all the preceding, had been borne exclusively by the annuity of the widow, the other three having been paid always in full.

Elizabeth Haffey Reed had married a Mr. Walton, and a settle-

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ment was executed on her marriage, which comprised her interest under the will.

Mrs. Anna Isabella Anderson, one of the annuities had died.

The widow was still living.

The questions for the consideration of the court were the following:—

1. Whether the legacy of 3,500*l.* had priority over the annuities, or over the other legacies, or any and which of them.

2. Whether the annuities were bequeathed free of legacy duty.

3. Whether Ann Elvira Reed was entitled to retain the 133*l.* 1*s.* 6*d.* which had been paid to her as the surplus income from the testator's estate at the expiration of one year from the testator's death, and to receive from the testator's estate the sum of 51*l.* 8*s.* 11*d.*, being the surplus income at the expiration of the second year.

4. Whether the widow was entitled to have the sums of 146*l.* 2*s.* 3*d.*, 361*l.* 12*s.* 9*d.*, 403*l.* 19*s.* 3*d.*, and 305*l.* 11*d.*, being the amount of the deficiency of the income of the testator's estate for the last four years, and the deficiency of income for the current year to pay her annuity, or any and what part of such deficiency made good out of the surplus of the preceding years, or out of the corpus or principal of the testator's estate.

5. Whether the annuitants, other than the widow, were entitled to priority over her annuity.

6. Whether the trustees of the settlement of Elizabeth Haffey Walton became, on the death of the annuitant Anna Isabella Anderson, entitled in possession to any and what portion of the corpus of the testator's estate under the clause in the testator's will relative to the cesser of the annuities given by his will.

7. Whether the legacy of 5,000*l.* was entitled, according to the true construction of the testator's will, to priority over the other legacies payable at the decease of Lucretia Haynes, or any and which of them.

8. Whether the persons interested in the legacies, given by the testator's will, and payable after the decease of his widow Lucretia Haynes, were entitled to have any and what proportion of the past or future income of the testator's estate set apart in order to provide for a possible deficiency of his estate to pay all the legacies.

9. Whether the annuities and legacies given by the testator's will, or any and which of them, were subject to abatement *inter se*, and if so, upon what principle such abatement should be made.

*Lewis* and *Ware* stated the case on behalf of the plaintiff, the trustee.

Upon the question of the priority of the legacies of 19*l.* 19*s.* and 3,500*l.*, and the three smaller annuities,

*Roll* and *Prior*, for the widow, contended that neither these legacies nor the three smaller annuities had priority over the annuity of 1,000*l.*

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*Walker* and *Begbie*, for some of the reversionary legatees, relied upon *Thwaites v. Foreman*, 1 Coll. 409, where the Vice-Chancellor *Knight Bruce* said: "*Prima facie*, all bequests stand on an equal footing, and it lies upon those who assert the contrary to prove it. It is not sufficient that the words in the will should leave the question in doubt. They must positively and clearly establish that it was the intention of the testator that the bequests should not stand upon an equal footing." They contended that no such intention was here indicated.

They also referred to the rule similarly laid down in *Brown v. Brown*, 1 Keen, 275.

Their lordships, without calling on the counsel for the other parties on this question, decided that the two legacies and three annuities were payable *pari passu*, but that they had priority over the other gifts.

Upon the question of the legacies being subject to legacy duty, *Roll* and *Prior*, for the widow, and *Bazalgette* and *Jessell*, for the other annuitants, contended that the annuities were free from duty.

*Walker* and *Begbie*, contra. *Gude v. Mumford*, 2 Y. & C. 448; *Sanders v. Kiddell*, 7 Sim. 536; *Marris v. Burton*, 11 Sim. 161; *Ford v. Ruxton*, 1 Coll. 403; *Courtois v. Vincent*, T. & R. 433; *Baily v. Boulth*, 14 Beav. 595; s.c. 9 Eng. Rep. 51, were cited.

KNIGHT BRUCE, L. J., said that he considered this point as settled in favor of annuitants by authority which ought not to be disturbed, although, in the absence of authority, he might have held differently.

TURNER, L. J., concurred.

Upon the question whether the annuities were payable out of the corpus,

*Walker* and *Begbie* referred to *Foster v. Smith*, 1 Ph. 629; *Innes v. Mitchell*, 1 Ph. 710; and *Wroughton v. Colquhoun*, 1 De G. & S. 357.

*Bacon* and *Baggallay*, for other parties.

KNIGHT BRUCE, L. J., said that the will was not very clear upon this point, as to the widow's annuity. There appeared some force in the argument derived from the direction in the will, that the securities were not to be changed without the consent of the widow, but not sufficient to prevail against the inference to be drawn from other parts of the will, that the annuity was intended to be paid in full. His lordship held, that all the annuities were payable out of the capital.

TURNER, L. J., was of opinion that the gift to the widow being of

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a clear annuity or yearly sum, took precedence of the gift of the residue, and that the words "after full payment and satisfaction of the aforesaid four annuities," overrode the provisions for the distribution of the capital after the death of the widow, and that all the annuities were payable out of the capital.

The other questions were then discussed.

The following was the substance of the decree:—

1. Declare that the legacies of 19*l.* 19*s.* and 3,500*l.*, and the annuities of 100*l.*, 30*l.*, and 70*l.*, bequeathed by the will of the testator, have priority over all other gifts in the said will.

2. Declare that the annuities of 100*l.*, 30*l.*, and 70*l.* are given free of legacy duty, and that the legacy duty is payable out of the corpus of the testator's property.

3. Declare that Ann Elvira Reed is entitled to retain the sum of 133*l.* 1*s.* 6*d.* paid to her, and to the sum of 51*l.* 8*s.* 11*d.* now in the hands of the plaintiff.

4. Declare that the annuity of 1,000*l.* given to the Lucretia Haynes is chargeable upon the capital of the testator's estate in priority to the legacies given after her death, and that she is entitled to have the sums of 146*l.* 2*s.* 3*d.*, 361*l.* 12*s.* 9*d.*, 408*l.* 19*s.* 3*d.*, and 305*l.* 11*d.*, and any arrears of the annuity since accrued, raised out of the corpus of the estate.

5. Declare that the annuitants, other than Lucretia Haynes, under the said will, are entitled to have the deficiency of income to pay their annuities, made good out of the corpus of the estate, whether Lucretia Haynes consent or not.

6. Declare that the trustees of Elizabeth Haffey Walton's settlement did not on the death of Anna Isabella Anderson, become entitled in possession to any portion of the corpus of the said estate, but that the funds out of which the annuity of Anna Isabella Anderson was payable, followed the devolution of the said testator's residuary estate.

7. Declare that the legacy of 5,000*l.*, which is subject to the power of appointment by Lucretia Haynes, has no priority over the other legacies payable at the decease of the said Lucretia Haynes.

8. Declare that no part of the past or future income of the estate ought to be set apart to provide for a possible deficiency of the estate to pay all the legacies made payable at the death of Lucretia Haynes.

9. Declare that the legacies payable at the death of Lucretia Haynes, will, in case of deficiency, be liable to abate *inter se pari passu*.

Costs of all parties out of the capital of the estate.

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 Heath v. Weston.
 

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## HEATH v. WESTON.

February 23, 1853.

*Will — Construction — Annuities comprised in term Legacies.*

By a will commencing thus: "I give and bequeathe the several legacies and annual sums following," a testatrix bequeathed pecuniary legacies and an annuity, and directed two sums of money to be set apart sufficient to produce two other specified annual sums, which the testatrix bequeathed to two specified persons for their respective lives. She gave to trustees the residue of her personal estate, subject to the payment of her debts, funeral and testamentary expenses, and the legacies and annuities which she had bequeathed or might thereafter bequeathe by any codicil. And she devised her real estates to trustees for a term, upon trust to raise sufficient to pay her debts, legacies, and funeral, and testamentary expenses, but directed that her personal estate should be the primary and the term the secondary fund for payment of her debts, legacies, and funeral and testamentary expenses: —

*Held*, that the separate specification of "annuities," in some parts of the will, did not prevent annuities from being comprehended under the expression "legacies" in the trusts of the term.

THIS was a special case, which came on to be heard by their lordships originally. The question was, whether the word legacies in a will included annuities.

The will was that of Mrs. Frances Maria Scott, dated the 22d of October, 1844, which was, so far as material, as follows: "I give and bequeathe the several legacies and annual sums hereinafter mentioned to the several persons hereinafter named." The will then, after bequeathing several legacies of gross sums of money, proceeded thus: "I give and bequeathe unto Mary Nugent, widow, and her assigns, for and during the term of her natural life, provided she continue the widow of Nicholas Nugent, but not otherwise, one annuity or clear yearly sum of 100*l.* of lawful money of Great Britain." The testatrix then directed her trustees thereafter named, to invest such a sum, out of her general personal estate, as would, when invested in their names in the parliamentary stocks or public funds of Great Britain, produce by the dividends, interest, and annual produce thereof, the clear annual sum of 400*l.* And she directed that they, her said trustees, should stand and be possessed of the stocks or funds in or upon which the said sum should be invested, and the dividends, interest, and annual produce thereof upon the trusts following, that was to say, upon trust that they, her trustees, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, should pay the dividends, interest, and annual produce unto, or permit the same to be received by, Emily Weston, and her assigns, for her natural life, and from and immediately after her decease should stand and be possessed of, and interested in the stocks, funds, and securities, and the dividends, interest, and annual produce thereof, in trust for the children of Emily Weston, in such shares and with such restrictions as therein particularly mentioned; and, in case there should be no child or children of Emily Weston,

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who should become entitled to the trust fund under the aforesaid trusts, then as to one equal fourth part of the dividends, interest, and annual produce of the trust-moneys, stocks, funds, and securities, upon trust that they, the trustees, should pay the same unto, or permit the same to be received by, Emma Blair, and her assigns, for her life; and as to one other equal fourth part of the dividends, interest, and annual produce of the trust-moneys, stocks, funds, and securities, upon trust that they, her trustees, should pay the same unto, or permit the same to be received, by Charlotte Johnson, for her life; and as to the said two equal fourth parts of the trust-moneys, stocks, funds, and securities, from and after the respective deceases of Emma Blair and Charlotte Johnson, and as to the remaining two equal fourth parts of the trust-moneys, stocks, funds, and securities, and the dividends, interest, and annual produce thereof, after the decease of Emily Weston and such failure of her children as aforesaid, the same should sink into, and form part of her, the testatrix's, residuary personal estate thereafter bequeathed. The testatrix thereby also directed her trustees, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, to invest such a sum out of her personal estate as would be sufficient, when invested in their names in the parliamentary stocks or public funds, to produce by the dividends, interest, and annual produce thereof, the clear yearly sum of 200*l*., and to stand and be possessed of the stocks or funds in or upon which the last-mentioned sum should be so invested, and the dividends, interest, and annual produce thereof, upon trust for such person or persons as her, the testatrix's, god-daughter, Frances Maria Armstrong, should appoint. And, in default thereof, into the proper hands of Frances Maria Armstrong, for her separate use. And, after the decease of Frances Maria Armstrong, then as to the trust-moneys, stocks, funds, and securities, and the dividends, interest, and annual produce thereof, in trust for such persons as Frances Maria Armstrong should appoint; and, in default of appointment, then the last-mentioned trust-moneys, stocks, funds, and securities, and the dividends, interest, and annual produce thereof should sink into, and form part of, the testatrix's residuary personal estate thereafter bequeathed. And the testatrix gave, devised, and bequeathed all her freehold and copyhold messuages, farms, lands, tenements, tithes, and hereditaments, whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy as to her freehold hereditaments, to the use of Chas. Heath and Chas. Shapland Whitmore, their executors, administrators, and assigns, for the term of 1,000 years, to commence and be computed from the day of her decease, upon the trusts and subject to the powers and declarations thereafter expressed. And as to, for, and concerning all the residue and remainder of the testatrix's personal estate and effects, of what nature or kind soever, and wherever situate or being, (subject to and charged with the payment of her just debts and funeral and testamentary expenses, and the legacies and annuities thereinbefore bequeathed, and which she might bequeathe by any codicil or codicils thereto,) the testatrix gave and bequeathed the same to the like persons, and in like man-

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ner as she had before devised the said real estate. And as to the term of 1,000 years thereinbefore limited to C. Heath and C. S. Whitmore, their executors, administrators, and assigns, the testatrix declared that the same term was so limited to them upon trusts that they, or the survivor of them, or the executors or administrators of such survivor, should, as soon as conveniently might be after her decease, by demising, assigning, mortgaging, selling, or otherwise disposing of the farms, messuages, lands, tenements, hereditaments, and premises comprised in the term of 1,000 years, or any of them, or any part thereof, for the whole or any part of the said term, or by, with, and out of the rents and profits of the hereditaments and premises, or any of them, or by bringing actions against the tenants or occupiers of the same hereditaments, or any of them, for the rent then in arrear, or by more than one, or by all the aforesaid ways and means, or by any other reasonable ways and means, levy and raise any sum or sums of money which the said C. Heath and C. S. Whitmore, or the survivor of them, or the executors or administrators of such survivor, should, in their or his discretion, think fit or expedient to levy and raise for the payment of the testatrix's debts, legacies, and funeral and testamentary expenses, and should pay and apply the moneys to be levied and raised by the ways and means aforesaid, or any of them, in or towards the payment or satisfaction and discharge of her debts, legacies, and funeral and testamentary expenses; provided always, and the testatrix thereby declared, that her personal estate should be considered as the primary, and the term of 1,000 years the secondary fund for the payment of her debts, legacies, funeral and testamentary expenses; and the testatrix appointed Henry Luttrell, Chas. Heath, Chas. Shapland Whitmore, and Robert Gwyn, joint executors of her will.

The testatrix died on the 5th of September, 1845.

The testatrix's personal estate, after payment of her debts, legacies, and expenses, was insufficient for payment of the legacies, and of the annuity of 100*l.* to Mrs. Nugent, and of the two sums directed to be invested sufficient to produce the annual income of 200*l.* and 400*l.*

The question for the opinion of the court was, whether the annuity of 100*l.* and the sums directed to be invested sufficient to produce the annual sums of 400*l.* and 200*l.*, or any and which of them were or was to be considered as legacies within the meaning of the will, so as to make them chargeable on the real estate, or raisable under the trusts of the term for 1,000 years.

*Wigram, Rolt, Malins, James, Schomberg, and Dickinson*, appeared for the several parties.

The following cases were cited: *Sibley v. Perry*, 7 Ves. 522; *Nannock v. Horton*, 7 Ves. 391; *Bonner v. Bonner*, 13 Ves. 379; *Shipperdson v. Tower*, 1 Y. & C. C. C. 441; *Bromley v. Wright*, 7 Hare, 334; *Cornfield v. Wyndham*, 2 Coll. 184.

[In the course of the argument, the Lord Justice Knight Bruce inquired, whether it was meant to be contended that if a testator in one place mentioned both the genus and one species included in the

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satisfy justice. The effect of the judgment of the commissioner is, to deprive the bankrupt of the power of entering into trade, until he has paid all the debts which could be proved under the bankruptcy. I do not consider it to be in general consistent with good policy to allow a bankrupt to enter into trade, protecting his person, and leaving all his estate subject to be swept away under an execution issued by any creditor to whom he was indebted before his bankruptcy. Extreme cases may occur in which justice may require such a course to be taken; but it does not appear to me consistent with sound policy generally to grant certificates in such a form. With regard to the conduct of the bankrupt towards Mr. Kell, I feel no doubt that there was a *bond fide* belief, on the part of the bankrupt, that he was not indebted to Kell in the amount claimed. It is, however, said that the bankrupt made a composition with his creditors five years ago, and that the circumstance disentitles him to a certificate which will do more than protect his person. It appears to me, however, that the composition was rendered necessary by misfortune. It has been argued, on behalf of the respondent, that the certificate, in such a case, ought not to protect the bankrupt's property, by analogy to the provision in the act of Geo. IV., that where a bankrupt had compounded with his creditors, and had paid less than 15s. in the pound, his future assets were not to be discharged. I think, however, that this argument rather tends the other way, and that, from the omission of a similar provision in the present act, we may infer that the legislature considered such a punishment too severe to be inflicted in every such case.

Another charge made against the bankrupt is founded on the absence of accounts; but it is to be considered that this bankrupt was a ship-owner, having only two small vessels, and was not a trader in extensive business; and that the same importance does not attach to the absence of books in such a case as on one of general trading. His absence abroad is, perhaps, the least justifiable part of his conduct, but I think that it is rather to be attributed to angry feelings than to any settled principle of dishonesty. Although it cannot be justified, I think it is not sufficient ground for subjecting all his future property to his past debts. Upon the whole, it appears to me, that the measure of justice awarded by my learned brother, is the right one.

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 HAYNES v. HAYNES.

February 19, 1853.

*Will—Construction—Priority between Legatees—Clear Annuity—Legacy Duty.*

A testator, after bequeathing two pecuniary legacies, bequeathed three "clear" annuities for the lives of the annuitants. He then bequeathed his residuary estate in trust to pay a

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clear annuity of 1,000*l.* to his widow, and upon trust, after payment of the four annuities, to pay the residue of the income during the life of the widow to A. The capital of the residue, after the widow's death, was to be held as to 5,000*l.* upon such trusts as the widow should appoint, and subject to her appointment the 5,000*l.* was to be held in trust for B, for life, and after her death to fall into the general residue; and subject to such disposition as aforesaid, and as to the residue of the testator's estate and effects after the widow's death, and subject as to the 5,000*l.* and the interest thereof as aforesaid, upon trust to pay certain legacies amounting to 18,000*l.*, with an ultimate residuary gift to E. And there was a direction that, upon the death of the several annuitants, the funds on which the annuities were secured should follow the ultimate destination of the residue:—

*Held*, 1. That the two first-mentioned pecuniary legacies and three annuities had priority over every other gift.

2. That the annuities were given free of legacy duty.

3. That the annuities were charged on the capital of the residue, but that A was entitled to retain the surplus income paid to her in one year, and to receive the surplus for another, although the income was in the subsequent years insufficient to answer the annuities.

4. That on the death of an annuitant in the lifetime of the widow, the ultimate residuary legatee did not become at once entitled to the fund set apart to answer the annuity.

5. That after the widow's death, the 5,000*l.* would have no priority over the other reversionary legacies.

6. That the reversionary legatees were not entitled to have any surplus income, during the widow's life, set apart to secure payment of their legacies.

THIS was a special case, which by leave came on to be heard in the first instance, before the lords justices, for the purpose of determining the construction to be put upon the will of Edmund Haynes.

By the will, dated the 30th of December, 1845, the testator, after directing payment of his debts and funeral and testamentary expenses, bequeathed a legacy of 19*l.* 19*s.* to his brother, and bequeathed to Elizabeth Haffey Reed the sum of 3,500*l.* He then gave and bequeathed unto his wife, her executors, administrators, and assigns, all his household goods, furniture, books, plate, wines, linen, and china, horses, carriage, and effects of every description which should be in, or upon his dwelling-house and premises at the time of his decease absolutely. And he bequeathed unto Mrs. Anna Isabella Anderson, for her life, a clear annuity, or yearly sum of 100*l.*; and he bequeathed unto his sister, Dorothy Haswell, for her life, a clear annuity, or yearly sum of 30*l.*; and to his sister, Ann Ellcock Walton, for her life, a clear annuity or yearly sum of 70*l.*; and he directed the same several annuities to be paid on the 1st of September in each and every year during the lives of the respective annuitants, by his trustees and executors thereafter named; the first payment of the said annuities to be made on such 1st day of September as should occur next after his decease. And he devised and bequeathed all that his dwelling-house, gardens, stables, and premises in which he then resided, situate at Summerland Place, together with all the rest, residue, and remainder of his real and personal estate, whatsoever and wheresoever, and of what nature, or kind soever, unto the plaintiff, his heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon trust, in the first place, out of the moneys which should come to his or their hands, to set apart and appropriate a sufficient part thereof, or fund, in the names, or name of his said trustee, to raise and pay unto his wife one clear annuity, or yearly sum of 1,000*l.*, by equal proportions quarterly, during her life, on the four most usual

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days of payment of rent in the year, the first payment thereof to be made on such of the said days as should occur next after his decease; but no proportion of the said annuity was to be payable for the days of the current quarter which should have elapsed from the date of the last payment to the day of the death of the said annuitant. And he thereby gave and bequeathed the said annuity, or yearly sum of 1,000*l.* to his said wife during her life accordingly. And after full payment and satisfaction of the aforesaid four annuities thereinbefore given, upon trust to pay all the surplus, or residue of the annual interest, income, and dividends arising out of the residue of his said estate and effects during the lifetime of his wife unto Ann Elvira Reed and her assigns absolutely. And from and immediately after the decease of his wife, as to the sum of 5,000*l.* sterling, part of the principal, or residue of his estate and effects, upon trust that his trustee should pay and apply the said sum of 5,000*l.*, or any part thereof, to such person and persons and in such manner and form as his wife by any deed or deeds, or by her last will and testament in writing, should direct or appoint, give, or bequeathe, the same or any part thereof, or for want of any such direction or appointment, gift, or devise, and so far as any such, if incomplete, should not extend, and as to such parts thereof as should remain undisposed of by his wife, upon trust as to the annual interest and dividends of the 5,000*l.*, and he gave and bequeathed the same interest and dividends unto Elizabeth Reed, for her life; and as to the principal sum of 5,000*l.*, he directed that the same should go with and become part of his residuary estate and effects after the death of the survivor of them his wife and Elizabeth Reed, subject to such disposition thereof by his wife as aforesaid; and as to the remainder of the said principal, or residue of his estate and effects after the decease of his wife, (but subject, nevertheless, to the annuities to Mrs. Anderson, Mrs. Haswell, and Mrs. Ann Ellcock Walton as aforesaid, and also subject as to the said 5,000*l.* and the interest thereof, subject as aforesaid,) upon trust that his trustee might and should pay, and he thereby gave and bequeathed the same as follows, that was to say: To his nephew Freeman Oliver Haynes, the sum of 2,000*l.*; to the aforesaid Elizabeth Haffey Reed, the sum of 9,000*l.*; to the defendant, Jane Morris Reed, the sum of 1,000*l.*; to the defendant, Lucy Haynes Reed, the sum of 2,000*l.*; and to the defendant, Frances Haynes Reed, the sum of 1,000*l.*; to the defendant, Haynes Walton, the defendant, Dorothy Walton, Charlotte Brown, and to Henry Haynes Walton, the sum of 1,000*l.* each. And, subject as aforesaid, he gave, devised, and bequeathed all the rest, residue, and remainder of his estate and effects, both real and personal, whatsoever and wheresoever, unto Elizabeth Haffey Reed, her heirs, executors, administrators, and assigns absolutely. And he thereby directed and requested that the dwelling-house and premises might not be sold, or disposed of in the lifetime of his wife, without her consent; but after her decease, and in case he should not leave sufficient moneys behind him to enable his trustees and executors to discharge the several annuities and legacies so given and bequeathed as aforesaid, then he thereby directed and empowered his trustees and executors

to sell his dwelling-house, gardens, stables, and premises, either by public auction, or private contract, as they might think proper, and pay and apply the proceeds arising from such sales, or so much thereof as should be necessary for the same, towards the payment of the same annuities and legacies respectively. And if the whole of such proceeds should not be consumed in such payments, then he thereby directed that the overplus, if any, should fall into and be considered as part of his residuary estate and effects, and go and be applied as in and by his will was directed. And he directed and requested that none of the funds, investments, or securities in which his property might be invested at the time of his decease might be altered, varied, or changed during the lifetime of his wife without her consent; yet with her consent it was his will that the same should and might be altered and changed as she might, with the consent of his trustees, direct. And he thereby directed that upon and after the death of the several annuitants, and the consequent cesser of the annuities, the several parts, or funds upon which the same were, or was respectively invested or secured, or out of which the same were, or was respectively payable, should follow the ultimate destination of the residue of his said estate.

The actual income which had arisen from the testator's estate during the first year from his decease amounted to 1,298*l.* 1*s.* 6*d.*, (after deducting income tax,) and the four annuities given by the will, (after deducting income tax,) amounted to 1,165*l.*, so that during the first year there was a surplus income of the testator's estate amounting to 133*l.* 1*s.* 6*d.*, which was at the expiration of the year paid, (less the legacy duty,) to Ann Elvira Reed.

In the month of November, 1847, a mortgage debt of 3,000*l.*, forming part of the assets, was paid off by the mortgagor, and produced the net sum of 2,850*l.*, which sum, with the concurrence of the testator's widow, was invested by the plaintiff in the purchase of three per cent. consolidated bank annuities.

On the 2d of May, 1848, being the expiration of the second year from the testator's death, there was a surplus income, after payment of the annuities less the income tax, amounting to 51*l.* 8*s.* 11*d.*, which was retained in the hands of the plaintiff.

At the expiration of the third year there was a deficiency of income to pay the several annuities by 146*l.* 2*s.* 3*d.*, and in the fourth and fifth years the income was deficient by the respective sums of 361*l.* 12*s.* 9*d.*, and 408*l.* 19*s.* 3*d.* to answer the annuities.

No parts of the testator's estate were ever particularly set apart or appropriated for payment of the annuities given by the will, but the annuities were paid by and out of the general income of the testator's estate so far as the same extended.

The income for the testator's estate ending in May, 1852, again proved insufficient to pay the annuities in full, the deficiency in that year amounting to 305*l.* 11*d.*, which deficiency, as well as all the preceding, had been borne exclusively by the annuity of the widow, the other three having been paid always in full.

Elizabeth Haffey Reed had married a Mr. Walton, and a settle-

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ment was executed on her marriage, which comprised her interest under the will.

Mrs. Anna Isabella Anderson, one of the annuities had died.

The widow was still living.

The questions for the consideration of the court were the following:—

1. Whether the legacy of 3,500*l.* had priority over the annuities, or over the other legacies, or any and which of them.

2. Whether the annuities were bequeathed free of legacy duty.

3. Whether Ann Elvira Reed was entitled to retain the 133*l.* 1*s.* 6*d.* which had been paid to her as the surplus income from the testator's estate at the expiration of one year from the testator's death, and to receive from the testator's estate the sum of 51*l.* 8*s.* 11*d.*, being the surplus income at the expiration of the second year.

4. Whether the widow was entitled to have the sums of 146*l.* 2*s.* 3*d.*, 361*l.* 12*s.* 9*d.*, 408*l.* 19*s.* 3*d.*, and 305*l.* 11*d.*, being the amount of the deficiency of the income of the testator's estate for the last four years, and the deficiency of income for the current year to pay her annuity, or any and what part of such deficiency made good out of the surplus of the preceding years, or out of the corpus or principal of the testator's estate.

5. Whether the annuitants, other than the widow, were entitled to priority over her annuity.

6. Whether the trustees of the settlement of Elizabeth Haffey Walton became, on the death of the annuitant Anna Isabella Anderson, entitled in possession to any and what portion of the corpus of the testator's estate under the clause in the testator's will relative to the cesser of the annuities given by his will.

7. Whether the legacy of 5,000*l.* was entitled, according to the true construction of the testator's will, to priority over the other legacies payable at the decease of Lucretia Haynes, or any and which of them.

8. Whether the persons interested in the legacies, given by the testator's will, and payable after the decease of his widow Lucretia Haynes, were entitled to have any and what proportion of the past or future income of the testator's estate set apart in order to provide for a possible deficiency of his estate to pay all the legacies.

9. Whether the annuities and legacies given by the testator's will, or any and which of them, were subject to abatement *inter se*, and if so, upon what principle such abatement should be made.

*Lewin* and *Ware* stated the case on behalf of the plaintiff, the trustee.

Upon the question of the priority of the legacies of 19*l.* 19*s.* and 3,500*l.*, and the three smaller annuities,

*Roll* and *Prior*, for the widow, contended that neither these legacies nor the three smaller annuities had priority over the annuity of 1,000*l.*

*Walker* and *Begbie*, for some of the reversionary legatees, relied upon *Thwaites v. Foreman*, 1 Coll. 409, where the Vice-Chancellor *Knight Bruce* said: "*Prima facie*, all bequests stand on an equal footing, and it lies upon those who assert the contrary to prove it. It is not sufficient that the words in the will should leave the question in doubt. They must positively and clearly establish that it was the intention of the testator that the bequests should not stand upon an equal footing." They contended that no such intention was here indicated.

They also referred to the rule similarly laid down in *Brown v. Brown*, 1 Keen, 275.

Their lordships, without calling on the counsel for the other parties on this question, decided that the two legacies and three annuities were payable *pari passu*, but that they had priority over the other gifts.

Upon the question of the legacies being subject to legacy duty, *Rolt* and *Prior*, for the widow, and *Bazalgette* and *Jessell*, for the other annuitants, contended that the annuities were free from duty.

*Walker* and *Begbie*, contra. *Gude v. Mumford*, 2 Y. & C. 448; *Sanders v. Kiddell*, 7 Sim. 536; *Marris v. Burton*, 11 Sim. 161; *Ford v. Ruxton*, 1 Coll. 403; *Courtois v. Vincent*, T. & R. 433; *Baily v. Boulton*, 14 Beav. 595; s. c. 9 Eng. Rep. 51, were cited.

KNIGHT BRUCE, L. J., said that he considered this point as settled in favor of annuitants by authority which ought not to be disturbed, although, in the absence of authority, he might have held differently.

TURNER, L. J., concurred.

Upon the question whether the annuities were payable out of the corpus,

*Walker* and *Begbie* referred to *Foster v. Smith*, 1 Ph. 629; *Innes v. Mitchell*, 1 Ph. 710; and *Wroughton v. Colquhoun*, 1 De G. & S. 357.

*Bacon* and *Baggallay*, for other parties.

KNIGHT BRUCE, L. J., said that the will was not very clear upon this point, as to the widow's annuity. There appeared some force in the argument derived from the direction in the will, that the securities were not to be changed without the consent of the widow, but not sufficient to prevail against the inference to be drawn from other parts of the will, that the annuity was intended to be paid in full. His lordship held, that all the annuities were payable out of the capital.

TURNER, L. J., was of opinion that the gift to the widow being of

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a clear annuity or yearly sum, took precedence of the gift of the residue, and that the words "after full payment and satisfaction of the aforesaid four annuities," overrode the provisions for the distribution of the capital after the death of the widow, and that all the annuities were payable out of the capital.

The other questions were then discussed.

The following was the substance of the decree:—

1. Declare that the legacies of 19*l.* 19*s.* and 3,500*l.*, and the annuities of 100*l.*, 30*l.*, and 70*l.*, bequeathed by the will of the testator, have priority over all other gifts in the said will.

2. Declare that the annuities of 100*l.*, 30*l.*, and 70*l.* are given free of legacy duty, and that the legacy duty is payable out of the corpus of the testator's property.

3. Declare that Ann Elvira Reed is entitled to retain the sum of 133*l.* 1*s.* 6*d.* paid to her, and to the sum of 51*l.* 8*s.* 11*d.* now in the hands of the plaintiff.

4. Declare that the annuity of 1,000*l.* given to the Lucretia Haynes is chargeable upon the capital of the testator's estate in priority to the legacies given after her death, and that she is entitled to have the sums of 146*l.* 2*s.* 3*d.*, 361*l.* 12*s.* 9*d.*, 408*l.* 19*s.* 3*d.*, and 305*l.* 11*d.*, and any arrears of the annuity since accrued, raised out of the corpus of the estate.

5. Declare that the annuitants, other than Lucretia Haynes, under the said will, are entitled to have the deficiency of income to pay their annuities, made good out of the corpus of the estate, whether Lucretia Haynes consent or not.

6. Declare that the trustees of Elizabeth Haffey Walton's settlement did not on the death of Anna Isabella Anderson, become entitled in possession to any portion of the corpus of the said estate, but that the funds out of which the annuity of Anna Isabella Anderson was payable, followed the devolution of the said testator's residuary estate.

7. Declare that the legacy of 5,000*l.*, which is subject to the power of appointment by Lucretia Haynes, has no priority over the other legacies payable at the decease of the said Lucretia Haynes.

8. Declare that no part of the past or future income of the estate ought to be set apart to provide for a possible deficiency of the estate to pay all the legacies made payable at the death of Lucretia Haynes.

9. Declare that the legacies payable at the death of Lucretia Haynes, will, in case of deficiency, be liable to abate *inter se pari passu*.

Costs of all parties out of the capital of the estate.

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 Heath v. Weston.
 

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## HEATH V. WESTON.

February 23, 1853.

*Will — Construction — Annuities comprised in term Legacies.*

By a will commencing thus: "I give and bequeathe the several legacies and annual sums following," a testatrix bequeathed pecuniary legacies and an annuity, and directed two sums of money to be set apart sufficient to produce two other specified annual sums, which the testatrix bequeathed to two specified persons for their respective lives. She gave to trustees the residue of her personal estate, subject to the payment of her debts, funeral and testamentary expenses, and the legacies and annuities which she had bequeathed or might thereafter bequeathe by any codicil. And she devised her real estates to trustees for a term, upon trust to raise sufficient to pay her debts, legacies, and funeral, and testamentary expenses, but directed that her personal estate should be the primary and the term the secondary fund for payment of her debts, legacies, and funeral and testamentary expenses: —

*Held*, that the separate specification of "annuities," in some parts of the will, did not prevent annuities from being comprehended under the expression "legacies" in the trusts of the term.

THIS was a special case, which came on to be heard by their lordships originally. The question was, whether the word legacies in a will included annuities.

The will was that of Mrs. Frances Maria Scott, dated the 22d of October, 1844, which was, so far as material, as follows: "I give and bequeathe the several legacies and annual sums hereinafter mentioned to the several persons hereinafter named." The will then, after bequeathing several legacies of gross sums of money, proceeded thus: "I give and bequeathe unto Mary Nugent, widow, and her assigns, for and during the term of her natural life, provided she continue the widow of Nicholas Nugent, but not otherwise, one annuity or clear yearly sum of 100*l.* of lawful money of Great Britain." The testatrix then directed her trustees thereafter named, to invest such a sum, out of her general personal estate, as would, when invested in their names in the parliamentary stocks or public funds of Great Britain, produce by the dividends, interest, and annual produce thereof, the clear annual sum of 400*l.* And she directed that they, her said trustees, should stand and be possessed of the stocks or funds in or upon which the said sum should be invested, and the dividends, interest, and annual produce thereof upon the trusts following, that was to say, upon trust that they, her trustees, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, should pay the dividends, interest, and annual produce unto, or permit the same to be received by, Emily Weston, and her assigns, for her natural life, and from and immediately after her decease should stand and be possessed of, and interested in the stocks, funds, and securities, and the dividends, interest, and annual produce thereof, in trust for the children of Emily Weston, in such shares and with such restrictions as therein particularly mentioned; and, in case there should be no child or children of Emily Weston,

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who should become entitled to the trust fund under the aforesaid trusts, then as to one equal fourth part of the dividends, interest, and annual produce of the trust-moneys, stocks, funds, and securities, upon trust that they, the trustees, should pay the same unto, or permit the same to be received by, Emma Blair, and her assigns, for her life; and as to one other equal fourth part of the dividends, interest, and annual produce of the trust-moneys, stocks, funds, and securities, upon trust that they, her trustees, should pay the same unto, or permit the same to be received, by Charlotte Johnson, for her life; and as to the said two equal fourth parts of the trust-moneys, stocks, funds, and securities, from and after the respective deceases of Emma Blair and Charlotte Johnson, and as to the remaining two equal fourth parts of the trust-moneys, stocks, funds, and securities, and the dividends, interest, and annual produce thereof, after the decease of Emily Weston and such failure of her children as aforesaid, the same should sink into, and form part of her, the testatrix's, residuary personal estate thereafter bequeathed. The testatrix thereby also directed her trustees, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, to invest such a sum out of her personal estate as would be sufficient, when invested in their names in the parliamentary stocks or public funds, to produce by the dividends, interest, and annual produce thereof, the clear yearly sum of 200*l*., and to stand and be possessed of the stocks or funds in or upon which the last-mentioned sum should be so invested, and the dividends, interest, and annual produce thereof, upon trust for such person or persons as her, the testatrix's, god-daughter, Frances Maria Armstrong, should appoint. And, in default thereof, into the proper hands of Frances Maria Armstrong, for her separate use. And, after the decease of Frances Maria Armstrong, then as to the trust-moneys, stocks, funds, and securities, and the dividends, interest, and annual produce thereof, in trust for such persons as Frances Maria Armstrong should appoint; and, in default of appointment, then the last-mentioned trust-moneys, stocks, funds, and securities, and the dividends, interest, and annual produce thereof should sink into, and form part of, the testatrix's residuary personal estate thereafter bequeathed. And the testatrix gave, devised, and bequeathed all her freehold and copyhold messuages, farms, lands, tenements, tithes, and hereditaments, whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy as to her freehold hereditaments, to the use of Chas. Heath and Chas. Shapland Whitmore, their executors, administrators, and assigns, for the term of 1,000 years, to commence and be computed from the day of her decease, upon the trusts and subject to the powers and declarations thereafter expressed. And as to, for, and concerning all the residue and remainder of the testatrix's personal estate and effects, of what nature or kind soever, and wherever situate or being, (subject to and charged with the payment of her just debts and funeral and testamentary expenses, and the legacies and annuities thereinbefore bequeathed, and which she might bequeathe by any codicil or codicils thereto,) the testatrix gave and bequeathed the same to the like persons, and in like man-

ner as she had before devised the said real estate. And as to the term of 1,000 years thereinbefore limited to C. Heath and C. S. Whitmore, their executors, administrators, and assigns, the testatrix declared that the same term was so limited to them upon trusts that they, or the survivor of them, or the executors or administrators of such survivor, should, as soon as conveniently might be after her decease, by demising, assigning, mortgaging, selling, or otherwise disposing of the farms, messuages, lands, tenements, hereditaments, and premises comprised in the term of 1,000 years, or any of them, or any part thereof, for the whole or any part of the said term, or by, with; and out of the rents and profits of the hereditaments and premises, or any of them, or by bringing actions against the tenants or occupiers of the same hereditaments, or any of them, for the rent then in arrear, or by more than one, or by all the aforesaid ways and means, or by any other reasonable ways and means, levy and raise any sum or sums of money which the said C. Heath and C. S. Whitmore, or the survivor of them, or the executors or administrators of such survivor, should, in their or his discretion, think fit or expedient to levy and raise for the payment of the testatrix's debts, legacies, and funeral and testamentary expenses, and should pay and apply the moneys to be levied and raised by the ways and means aforesaid, or any of them, in or towards the payment or satisfaction and discharge of her debts, legacies, and funeral and testamentary expenses; provided always, and the testatrix thereby declared, that her personal estate should be considered as the primary, and the term of 1,000 years the secondary fund for the payment of her debts, legacies, funeral and testamentary expenses; and the testatrix appointed Henry Luttrell, Chas. Heath, Chas. Shapland Whitmore, and Robert Gwyn, joint executors of her will.

The testatrix died on the 5th of September, 1845.

The testatrix's personal estate, after payment of her debts, legacies, and expenses, was insufficient for payment of the legacies, and of the annuity of 100*l.* to Mrs. Nugent, and of the two sums directed to be invested sufficient to produce the annual income of 200*l.* and 400*l.*

The question for the opinion of the court was, whether the annuity of 100*l.* and the sums directed to be invested sufficient to produce the annual sums of 400*l.* and 200*l.*, or any and which of them were or was to be considered as legacies within the meaning of the will, so as to make them chargeable on the real estate, or raisable under the trusts of the term for 1,000 years.

*Wigram, Rolt, Malins, James, Schomberg, and Dickinson*, appeared for the several parties.

The following cases were cited: *Sibley v. Perry*, 7 Ves. 522; *Nannock v. Horton*, 7 Ves. 391; *Bonner v. Bonner*, 13 Ves. 379; *Shipperdson v. Tower*, 1 Y. & C. C. 441; *Bromley v. Wright*, 7 Hare, 334; *Cornfield v. Wyndham*, 2 Coll. 184.

[In the course of the argument, the Lord Justice Knight Bruce inquired, whether it was meant to be contended that if a testator in one place mentioned both the genus and one species included in the

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should severally attain that age in trust to pay to each child one full and equal part or share of the said fifth part of her said estate and effects to and for his and their own use and benefit forever. And as to, for, and concerning the other four parts of the said remaining half part of her said estate and effects, she gave and bequeathed the same unto the said James Beard and Thomas Holy, their executors, administrators, and assigns, upon trust to pay, divide, and apply the same in manner following: that was to say, one equal fourth part or share thereof unto and equally between the two children of her late nephew, Edmund Hobson, deceased, another son of John Hobson, their executors, administrators, and assigns, to and for their own use and benefit forever; another of such equal fourth parts or shares thereof unto and equally amongst the children of her niece, Elizabeth, late the wife of Samuel Schofield, deceased, a daughter of John Hobson, their executors, administrators, and assigns, to and for their own use and benefit forever; another of such equal fourth parts or shares thereof to and for the use and benefit of her nephew, Ralph Hobson, another son of John Hobson; and the remaining equal fourth part or share thereof to and for the use and benefit of her niece, Catherine, the wife of James Rayner, a daughter of John Hobson, during the term of their respective natural lives, by equal half yearly payments on every the 31st day of July and 31st day of January yearly.

The will then proceeded thus: "And my will is that in case any of the said sons or daughters of my said late brother John Hobson shall happen to die before the death of my said sister Sarah Green without lawful issue, then I give and bequeathe the part or share of my said estate and effects of him or her so dying without issue to the survivor of them the said Ralph Hobson and Catherine Rayner, for, his or her life, subject to the aforesaid restriction respecting their original shares; and in case any of them the said Ralph Hobson and Catherine Rayner shall happen to die in the lifetime of my said sister Sarah Green, or afterwards leaving lawful issue, then the part or share of my said estate and effects of him or her so dying and leaving lawful issue shall go to and be equally divided amongst his or her children as they shall respectively attain their several and respective ages of twenty-one years, and that the interest and proceeds of their said several parts and shares shall be paid and applied by my said trustees in the maintenance, education, and bringing up of the said children respectively till they attain the said age of twenty-one years."

The testatrix's sister, Sarah Green, died on the 10th of January, 1818. Catherine Rayner survived the testatrix and Sarah Green, and had several children. One of them, Daniel Lees, who attained twenty-one, died in May, 1831, in the lifetime of his mother, who died in 1842. Upon her death, the surviving trustee divided the residuary estate among the parties whom he considered entitled thereto, and on so doing paid the share of which Catherine Rayner was tenant for life among her children who survived her, and who had attained twenty-one. The administratrix of Daniel Lees and her

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husband thereupon filed the present claim seeking payment of a share of the residuary estate.

By the decree under appeal, it was declared that the plaintiffs in right of the administratrix were entitled to a distributive share of one moiety of the residuary estate, and accounts were directed. And it was ordered that the costs of the suit up to and including the hearing be paid by the defendant, the surviving trustee.

From this decree the defendant appealed.

*Roupell* and *Prendergast*, for the plaintiffs, supported the decree, and cited *Hutchinson v. Stevens*, 1 Kee. 240; and *Cousins v. Schroder*, 4 Sim. 23.

*Elmsley* and *Lewin*, for the defendant, said that the defendant in distributing the fund had acted upon the opinions of two of the most eminent counsel at the chancery bar.<sup>1</sup> They contended that the construction thus put upon the will was the right one, and that all events the defendant ought not under such circumstances to have been ordered to pay costs. They referred to *Beck v. Burn*, 7 Bea. 492; the dicta in *Packham v. Gregory*, 4 Hare, 398. See *Gundry v. Pinniger*, 1 De G. Mac. & G. 502; s. c. 11 Eng. Rep. 63; and the cases there referred to, and *Billingsley v. Wills*, 3 Atk. 219.

KNIGHT BRUCE, L. J. The question is, whether a child of Catherine Rayner who, after the testatrix's death, died in the lifetime of Catherine Rayner, having attained twenty-one, took a vested interest in the part of the share of the residuary estate of which Catherine Rayner was tenant for life. Upon this question no doubt could have arisen if the case had simply been one of the gift to Catherine Rayner for life and after her death in the language of the will, omitting the condition of Catherine Rayner leaving lawful issue. Would the case be varied if by a separate clause the testatrix had declared that if Catherine Rayner should die without leaving issue her share should fall into the residue, or go as in case of intestacy? No one will argue that this would have caused a difference. We should be making a will and guessing away what is plain if we acceded to the argument addressed to us on behalf of the defendant. With regard to the costs, the question relates to a small share of the residuary estate, one tenth or less. All the rest the executor has (no doubt with good motives) distributed. But he has thus precluded the persons entitled to this part from having the will construed at the expense of the general estate. I think the decree clearly right.

TURNER, L. J. I concur entirely in the construction which the Master of the Rolls has put upon this will. The first argument in support of a different construction is, that the bequest to the children of Catherine Rayner being only given in the contingent event of her

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<sup>1</sup> Mr. (afterwards Vice-Chancellor Sir) James Parker, and Mr. James Russell.

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leaving issue, therefore only the children who were living when the contingency happened would take. That argument would go to a great extent, and affect many decisions, affirming as it must the principle that where there is a gift to a class upon a contingent event, the time of the happening of the contingency determines the individuals composing the class. That is not the rule. Another argument was that there is no bequest except in the direction to pay. But Sir James Wigram has well laid down the rule with reference to questions of this description in *Bull v. Pritchard*, 5 Hare, 567. He there says: "There are two classes of cases, under one or the other of which the present case must fall. One class is, where the devise is to a party at a given age, and the property is given over if the devisee dies under that age. The other is, where the description of the devisee is such as to make the given age part of that description. In cases of the former class, the court has discovered an intention expressed in the will, that the first devisee shall take all that the testator has to give, except what he has given to the devisee over; and, in order to give effect to that intention, has held, by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over, *Phipps v. Akers*, 9 Cl. & Fin. 583; 4 Man. & Gr. 1107; 3 Cl. & Fin. 703; nom. *Phipps v. Williams*? Sim. 44. In the second class, the court has held the devise contingent, upon the ground that no one could claim who could not predicate of himself that he was of the age required, — that otherwise he did not answer the entire description. *Festing v. Allen*, 12 M. & W. 279; 5 Hare, 573; and the cases there referred to." In this case, the gift to the children in the event of the parent leaving issue is absolute upon their attaining twenty-one, and the description of the children who are to take is not qualified.

His lordship also referred to *Halifax v. Wilson*, 16 Ves. 168.

*Appeal dismissed, with costs.*

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CROSSE v. THE GENERAL REVERSIONARY AND INVESTMENT COMPANY.<sup>1</sup>

December 10, 16, 17, and 19, 1853.

*Deed of Trust for Sale of Incumbered Estates — Costs of Trustees — Annuitant.*

The grantor of an annuity, which was the third incumbrance on his real estates, executed a trust-deed (to which the annuitant was not a party) whereby the estates were conveyed to trustees on trusts for sale to discharge the incumbrances according to their priorities; and

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<sup>1</sup> Before the Lord Chancellor, (LORD CRANWORTH.)

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the first trust of that deed was to pay the costs of the trustees in the conduct of the sale. After the execution of the trust-deed, the trustees applied to the annuitant for his consent to the sale. In answer to that application, the solicitors of the annuitant offered to facilitate the sale, but asked for a copy of the trust-deed, adding: "When we have seen the deed, we shall be better able to inform you whether our clients will have any difficulty in joining in the conveyances." And, in answer to a subsequent application, they assented to the appropriation of a part of the rents towards rendering the property more eligible for sale. Part of the property was sold, the annuitant concurring in the sale, whereby a sufficient sum was realized to pay the prior incumbrances; but it being apprehended that the residue of the property would not realize enough to pay both the costs of the trustees and to redeem the annuity, the trustees applied to the annuitant for leave to retain, in the first place, out of the future proceeds of sale, a sum sufficient to pay their costs. This being refused, and a bill being filed to compel the annuitant to join in the conveyances: —

*Held*, under the circumstances, that he was not bound to do so, except upon the terms of having the annuity redeemed.

THIS was an appeal by the defendants, the Reversionary Company, from a decree of the Vice-Chancellor Stuart, made on the 14th July, 1853. The plaintiffs, Andrew Crosse and Charles Baker, were the trustees under a trust-deed executed by the defendant, Charles John Kemeys Tynte, on 9th March, 1847, whereby certain estates belonging to C. J. K. Tynte had been conveyed to the plaintiffs upon trust for sale. The estates were at that time subject to two mortgages amounting to 90,000*l.*, and to a term of 500 years which had been demised by the defendant, C. J. K. Tynte, for the purpose of securing, during his life, to the defendants, the Reversionary Company, an annuity of 3,545*l.* The object of the trust-deed was to realize a sum sufficient to redeem the annuity, and to pay off all the incumbrances on the estate. The trust-deed provided that the proceeds of the sale were to be, in the first place, applied "in reimbursing the trustees, and allowing to each other, and in paying and satisfying to all other persons whomsoever all such costs, charges, and expenses as should or might be paid, sustained, incurred, or expended in or about or preparatory to the sale of the said several premises, and in or about the making out, establishing, or completing the title thereto respectively, and in enforcing the performance of any contracts," &c. and then, according to their priorities, in the satisfaction of the two mortgages and the redemption of the annuity.

The bill stated that divers letters were written and sent by, and passed between, Messrs. Baker and Co., the solicitors of the plaintiffs, and Messrs. Beavan and Anderson, the solicitors of the Reversionary Company, and Mr. Hodge, their actuary and secretary, with reference to, and for the purpose of, the Reversionary Company giving their consent to the sales proposed to be made under the trust deed for sale, and joining in the conveyances, surrenders, and assurances necessary to the completion of such proposed sales; and in particular that Messrs. Baker and Co. did, on the 27th August, 1847, write to Mr. Hodge the following letter: "Dear Sir — You will recollect that in March last an annuity of 3,545*l.*, payable to the Reversionary and Investment Company, was charged by Mr. Tynte, upon his Maindee estate, and other property subject to prior incumbrances thereon, amounting to 90,000*l.* Mr. Tynte, at the same time, executed a deed of trust for the sale of the Maindee estate, similar to that he had previously executed, and the trusts are the same, that is, out of the

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proceeds of the sale, to pay off all the incumbrances on the estate. The trustees have been called upon to carry this into effect, and the primary object in view is to pay off the two mortgages for 90,000*l.*, which are charges prior to the annuity, to your company. Having regard to the circumstance that the annual value of the estate is greatly insufficient to pay both the interest upon the mortgages and the annuity, the trustees feel bound, and are advised, to proceed to an immediate sale, and active measures are now in progress for that purpose: on behalf of the trustees we beg, therefore, to inquire whether the General Reversionary and Investment Company will be ready to concur, should it be necessary, in the conveyances to the purchasers, on seeing that the whole of the purchase-moneys are duly applied in liquidation of the prior charges on the estate, and afterwards in redemption of the annuity, and payment of the arrears thereof. We must request, at the same time, you will be good enough to receive this as a notice that the trustees intend to repurchase the annuity, upon the terms of the deed, at the expiration of fourteen days from the 9th of March, 1843, the period when the redemption money becomes payable. If, previously to that time, the produce of the sales should be sufficient to discharge, not only the prior mortgages, but the redemption money, arrears of annuity, and costs, we presume that the General Reversionary and Investment Company will not object to receive the whole amount due to them, before the stipulated period. We are, &c., Baker and Co."

On the 14th September, 1847, the secretary wrote to the solicitors of the plaintiffs, informing them that the board had referred their communication to the solicitors of the Reversionary and Investment Company, and on the 30th September, 1847, their solicitors, Messrs. Beavan and Anderson, sent the following answer to Messrs. Baker and Co.: "Gentlemen—*Re Tynte*. With reference to your communication to the secretary of the General Reversionary Company, of 27th August, and the subsequent letters to ourselves, on the subject thereof, we think you had better let us have a copy of the trust-deed, referred to by you, under which, as we understand, you contemplate making sales, in which you anticipate our clients may be called upon to concur. When we have seen that deed, we shall be better able to inform you whether our clients will have any difficulty in joining in the conveyances. We need not say that, as far as we are concerned, we shall be ready to give every facility in our power to whatever arrangements you may propose, with regard to the sales. We are, &c., Beavan and Anderson. Messrs. Baker and Co."

On the 6th April, 1848, Messrs. Baker and Co. wrote the following letter to the secretary of the Reversionary Company: "Sir—After paying the interest to the West of England Insurance Company, which is now discharged up to the 4th of last month, there is a balance of 100*l.* 5*s.* 3*d.*, applicable to the payment of the annuity to the Reversionary Company. There are arrears due from the tenants to some extent, and we have not been able to come to a settlement with the South Wales Railway Company, for the land agreed to be sold to them. But in making the necessary arrangements for the

sale, which is to take place in June next, it has been found indispensable, with a view to make the property as productive as possible, to lay out that portion of land near to and adjoining the town of Newport, as building land, and we are advised that it cannot be sold with any advantage, unless the roads are previously made by the vendors. The estimated expense of forming the roads is 1,103*l.* 8*s.* 11*d.*, and our proposal on behalf of the trustees for sale, is that your company should forego the payment, at the present moment, of the trifling sum now in hand, (100*l.* 5*s.* 3*d.*) and the arrears to be collected between this period and June next, and that the trustees should then take upon themselves the whole outlay for the roads, which they will at once proceed to make. This arrangement involves no sacrifice on the part of the company, except in deferring a small payment for a short period, as they are entitled to charge interest on the arrears of the annuity. If carried out immediately, the estates will, we are advised, produce a sufficient sum to pay off all the charges subsequent to yours. We are, &c., Baker and Co. To W. B. Hodge, Esq." On the 3d May, 1848, and in answer to the letter of the 6th April, Messrs. Beavan and Anderson, wrote thus to Messrs. Baker and Co.: "With reference to your letter of the 6th April, addressed to Mr. Hodge, we beg to inform you that the Directors of the General Reversionary Company are willing to forego the immediate payment of the arrears of rent now in hand, provided the subsequent incumbrancers' consent shall be obtained to the arrangement proposed in your letter; and we have further to inform you that, on the part of Mr. Beavan, we have no objection to the course proposed, as we are satisfied that the making of the roads, as contemplated, will increase the value of the property."

On the 6th May, 1848, Messrs. Baker and Co., again wrote to Messrs. Beavan and Anderson: "Gentlemen — Maindee estate: In acknowledging the receipt of your letter of the 3d instant, (which is quite satisfactory to the trustees,) on the subject of the roads, we beg to say that there is a further sum to be provided for in order to obtain possession of the land, which is indispensable as an approach from the town of Newport to the building ground. This portion of the estate was under lease, and upon the treaty for its surrender, no less a sum than 1,200*l.* was required, but we have ultimately succeeded in procuring a surrender of the lease from the tenant, for 542*l.* This was thought by those employed for the trustees, and particularly by Mr. Morris, the eminent surveyor at Newport, a very beneficial purchase. To enable you to form a judgment upon the subject, we send for your inspection, the plan of the building ground as now laid out, which it is intended to lithograph, and add to the particulars of this part of the property. The arrangement of these farms (part of the old park) as building land will, we are advised, add very considerably to the produce of the sale. In addition to the 1,103*l.*, for forming the roads, the 542*l.*, for purchasing the lease has to be added; and it is the sanction of your clients, to this further outlay, which is the object of our present application. We beg you to understand, at the same time, that the total sum thus required, (1,645*l.*) is not

likely to be obtained from the rents, but will have, in part at least, to be advanced by the trustees. We beg to be favored with as early a reply to this application as may be convenient to you. We are, &c., Baker and Co." In answer to this application, and on the 23d May following, Messrs. Beavan and Anderson, wrote as follows: "Our clients are not disposed to raise any objection to the application of the sum of 542*l.*, towards the purchase of the tenant's interest in Fair Oak Farm, provided the subsequent incumbrancers' consent be obtained."

The bill stated that, after the receipt of this communication, the plaintiffs expended 1,786*l.* 6*s.* 8*d.*, out of the moneys received for the rents of the estate, in constructing the roads and laying out the building plots, and in purchasing the tenant's interest; and that, in other respects, the plaintiffs, with the knowledge and privity of the prior incumbrancers, had proceeded with the arrangements for the proposed sale, particularly by preparing, publishing, advertising, and circulating, as was well known to the prior incumbrancers, printed particulars and conditions of the proposed sale.

In August, 1848, nearly the whole of the estate was sold by auction in various lots, and between that time and August, 1850, the remainder of the estate was sold. By the conditions of sale, subject to which all the purchases were made, it was provided that the incumbrancers and their trustees should be made parties, by and at the expense of the purchasers to the respective conveyances, and surrenders to be made to them, and the vendors should not be required, previously to completion, to procure reconveyances or surrenders, by any of such incumbrancers or their trustees.

The bill stated that no objection was made to the printed particulars or conditions of sale, or dissent therefrom, expressed by the prior incumbrancers or any of them, and in particular not by Messrs. Beavan and Anderson, nor by the Reversionary Company, nor by any director, trustee, or other officer of the Reversionary Company; nor were the sales made thereunder repudiated by the incumbrancers or any of them; but that, on the contrary, a large number of sales, effected under the said conditions, of lots described in the particulars, had, from time to time, been completed by deeds of conveyance or other instruments, reciting the particulars and conditions of sale, and carrying out the same, and which deeds of conveyance, or other instruments, had been from time to time approved of by the solicitors of the prior incumbrancers, and in particular by Messrs. Beavan and Anderson, on behalf of the Reversionary Company, and the directors and trustees thereof, and from time to time had been executed by the trustees for the time being, of the same company who were competent to join therein, in respect of the annuity, and the securities for the same.

After setting forth the receipt of large sums of money, from time to time, on account of the purchase-money, the bill stated that the costs, incurred by the directors and the trustees of the Reversionary Company, by reason of their joining in the assurances, and their solicitor's charges attending the same, (except the portion thereof

which the conditions of sale required the purchasers to pay,) were from time to time required by the company to be, and in fact, were paid by the plaintiffs out of the proceeds of the sales, or other the funds in the hands of the plaintiffs, as such trustees, but that the plaintiffs had not yet been paid their costs of the sales; and that it being certain much more than sufficient would remain of the proceeds of the sales, after the discharge of the prior mortgages, for payment of the costs of the sales, and the costs being only partly ascertained at the time of completing the purchases, it was not considered by the plaintiffs material to deduct the costs of the sales, (other than the costs which the Reversionary Company required to be paid,) out of the purchase-moneys, before paying off the prior mortgages.

The plaintiffs having out of the moneys realized by the sales discharged the two prior mortgages amounting to 90,000*l.*, together with the costs of the mortgagees, Messrs. Baker and Co., on the 8th December, 1851, wrote to Messrs. Beavan and Anderson, as follows: "Dear Sirs — Maindee estate: As the time is now nearly arrived when the remaining sales of this estate will be completed, we have thought that it may facilitate the settlement of the drafts of the purchase deeds to remind you of the necessity of making provision for the costs of the sales, as well as the incumbrances, out of the purchase-moneys remaining to be received. We assume the proper course after the balance of principal, interest, and costs to the West of England Insurance Company shall have been paid, will be to apply the remaining purchase-moneys according to the trusts declared by the deed under which the estate has been sold, namely, first, in paying the costs of the sale; secondly, in discharging the prior mortgages for 90,000*l.*; thirdly, in paying the arrears of annuity due to the Reversionary Company, and the surplus to be invested agreeably to the provisions of their annuity deed. We shall be glad to hear from you as soon as may be that this is what you consider to be the understanding between the vendors and your clients. We shall then be able to arrange with the purchasers the form of their purchase deeds, in reference to the application of the purchase-money. We are, &c., Baker and Co." In reply to which Messrs. Beavan and Anderson, on the 20th December, 1851, wrote as follows: "Your letter of the 8th inst., on the subject of the costs of sale of Mr. Tyn-te's Maindee estate has been under the consideration of the Board of Directors of the General Reversionary Company; and we are instructed to inform you that the directors cannot consent to the payment of the costs in question in priority to the claim of the company under their securities. We are, &c., Beavan and Anderson."

The proceeds of the sales not being sufficient to redeem the whole of the annuity, besides paying the costs and expenses of the sales, the defendants, the Reversionary Company, refused their consent to the payment of the costs incurred by the trustees to the prejudice of their security, and declined to join in, or execute any further conveyances after the amount due to the previous mortgagees of 90,000*l.* had been discharged, unless such further conveyances were so framed that the balance of the purchase-money should be made

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available for the security of their annuity, and unaffected by the plaintiff's claim. The bill alleged that inasmuch as the defendants, the Reversionary Company, had from time to time received the full amount of all costs incurred by them in and about the sales, and had not intimated or notified that they should object to the costs of the plaintiffs being in like manner paid, they had waived their priority, if they ever had any.

The bill also alleged that the prior mortgagees, the West of England Company, and George Leeke Baker, had power under their securities to pay the debts due to them by means of sales of the estates, and to pay in the first place the costs of such sales out of the proceeds thereof; and that they had in fact been paid off by means of the sales of the estates effected with their coöperation and concurrence as aforesaid, and that there was no other way of paying off their debts than a sale of the estates, and, therefore, that the costs of the sales had priority as a charge over the annuity granted to the Reversionary Company. The bill, after stating that several of the purchasers had claimed to be at liberty to rescind their contracts, the completion of which was only delayed by the refusal of the defendants, the Reversionary Company, to concur, prayed a declaration that they ought to join in completing and carrying into effect the sales at the expense of the trust estate; and that the costs, charges, and expenses of the plaintiffs in carrying out and completing the sales were a charge upon and ought to be borne by the moneys arisen from the sales.

This case came originally before the Vice-Chancellor on a motion of the plaintiffs, that the defendants, the Reversionary Company, should join in the conveyances; but on the suggestion of the Vice-Chancellor, the question was treated as being brought before him as on the hearing of the cause, and upon the affidavits of the secretary and solicitors of the defendants, the Reversionary Company. It was in evidence that on the 7th July, 1849, Messrs. Baker and Co. had written to Messrs. Beavan and Anderson, informing them that an arrangement had been entered into between the prior mortgagees and the plaintiffs for enabling the plaintiffs to retain out of the purchase-moneys then to be received 4,000*l.* on account of the trust expenses, and, adding, that such sum would be applicable to the payment of the costs generally including those of the defendants, and asking their consent to such an arrangement. On the 23d July, Messrs. Beavan and Anderson wrote, declining to accede to the arrangement.

In support, however, of the plaintiffs' case, one of the draft conveyances containing a recital that the sales had been made with the consent and approbation of the defendants, and which had been executed by the defendants after the 23d July, 1849, was relied upon. It appeared by the affidavit of Mr. Anderson, the defendants' solicitor, that the plaintiffs had proceeded to sell the estate without waiting to obtain any promise of concurrence from the Reversionary Company, and that at the time when the sales were made, the Reversionary Company, though informed of the existence of the trust-deed by the letter of the 27th August, 1847, were ignorant of

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the trusts therein contained for the payment of the trustees' costs, and that, in fact, till the 8th December, 1851, the company had not any intimation from the plaintiffs that they were about to appropriate any part of the purchase-moneys in payment of the plaintiffs' costs, before providing for the redemption of the annuity. With respect to the recital in one of the draft conveyances, to the effect that the company had concurred in the sale, he swore that such recital had escaped his notice; that it was the only one out of forty which had been executed by the defendants which contained such recital.

*Walker, Malins, and Lewis*, for the plaintiffs, in support of the Vice-Chancellor's decree.

The general rule, in cases of this sort, is, that a party may deny the right to deduct costs, provided he can claim the estate if unsold, on the ground that he need not incur costs of sale. Here, however, the defendants could not have prevented a sale by the prior incumbrancers, and having clearly authorized the sale and taken the benefit of the proceedings for the advantage of the whole body of creditors, they must contribute to the costs: *Kenebel v. Schraffon*, 13 Ves. 370; *White v. The Bishop of Peterborough*, Jacob, 402. They are in the situation of a mortgagee who seeks for something more than by his contract he is entitled to; as where he adopts a suit for the general administration of an estate which proves deficient; in which case the costs are clearly payable in the first instance out of the estate, *Armstrong v. Storer*, 14 Beav. 535; s. c. 11 Eng. Rep. 313.

They also referred to the cases of *Wild v. Lockhart*, 10 Beav. 320; *Hepworth v. Heslop*, 3 Hare, 485.

The *Solicitor-General* and *Cole* appeared on behalf of the defendants, the Reversionary Company, in support of the appeal.

The sale in this case was made without notice to the defendants, against whom, from the first intimation of the trust-deed in August, 1847, down to December, 1852, there is not a particle of evidence to show that they consented to the provision in the deed, which the bill here seeks to enforce. The case of *Wild v. Lockhart*, 10 Beav. 320, is clearly distinguishable; for there the sale had been consented to by the mortgagee. They relied upon the authorities of *Upper-ton v. Harrison*, 7 Sim. 444, and *Barnes v. Racster*, 1 Y. & C. C. C. 401.

*Toller* appeared for Tynte.

*Walker*, in reply.

LORD CHANCELLOR, (LORD CRANWORTH.) If the arguments of this case had commenced and closed on the same day, I should undoubtedly, not only for my own satisfaction, but in deference to the very high authority by whom the decree has been pronounced, have taken time to deliberate and consider the case in all its bearings; before I came to the conclusion that I ought to reverse that decree;

but it has now occupied altogether four days in argument. I have had the papers home with me, and have had full opportunity of examining the whole of the pleadings together, with the authorities to which I was referred. Having done so, it would now be mere idle waste of time if I were not at once to state that I cannot concur with the judgment to which the learned Vice-Chancellor has arrived. I think the decree he has pronounced has proceeded on erroneous grounds; and under the circumstances to which I have alluded, I am quite sure it will not be considered as any sort of disrespect to him if I at once state my opinion.

The object of the bill is, in the first place, to bind the Reversionary Company to concur in the completion of the sale of certain lots or pieces of property sold by the plaintiffs in the year 1848; and, secondly, to oblige the company to concur in the completion of those contracts upon the terms that the purchase-money arising from those sales should be in the first place applicable to discharge the expenses of the sale. I have come to the conclusion that there is nothing to warrant either of these propositions; there is nothing to warrant the proposition that the defendants are bound to concur in the sale, and of course nothing to warrant the proposition that they are bound to concur, and to allow a certain portion of the purchase-money to be applied in the first place to discharge the costs of the sale. Upon the first of these propositions I have had at times considerable doubt, but that is the conclusion I have eventually arrived at. I trust, however, from what has passed, that notwithstanding the opinion which I have expressed, the Reversionary Company will not act in a mode so as to question the propriety of these sales. I think, although the company was not in my opinion literally bound to adopt them, yet that it was very reasonable for the plaintiffs to have supposed that inasmuch as the Reversionary Company had approved of so many of the contracts of sale and conveyances, they would have approved all others that stood in a like position where sales had been made; and I trust, that on receiving the purchase-money, they will join in completing such sales.

I will now proceed to state why it is I think they are not bound to complete upon any terms short of receiving the whole of the purchase-money to the extent of their claim. In the first place, it is quite clear they were not parties to the contract of sale; but parties to a sale, though not parties to the contract, may so conduct themselves as to be estopped from saying that they are not bound to act as if they had been parties to the contract; no doubt that is a perfectly correct proposition both at law and in equity. But with the generality in which that proposition is sometimes enunciated I cannot concur. It is going much further than authority or common sense warrants to hold, that a person by standing by binds himself to complete that which other persons are doing upon the faith that he will not prevent its being done. Standing by and doing nothing may be like silence, which is sometimes as eloquent as any words. But the mere fact that a person has done nothing, and that somebody else is doing an act which cannot be perfected except with the concurrence of the person standing

by, cannot give a right against him ; otherwise, this most extraordinary result would follow, that by saying nothing to the person whose consent may be necessary, and by proceeding to do an act with the chance of his being compelled to adopt it by reason of his standing by, his consent would be inferred in the very case in which if it had been asked for it would have been refused.

Now, what has the Reversionary Company done to bind itself to the completion of these contracts? It appears that they obtained their security on the 9th March, 1847, which security consisted of the grant of an annuity for a large amount secured for Mr. Tynte's life by a term of 500 years. The property of Mr. Tynte was subject to a prior charge of 90,000*l.*, or rather, to be quite accurate, to two amalgamated charges, one of 85,000*l.*, and the other of 5,000*l.* As, however, the produce of the sale has been sufficient to pay off both those incumbrances, they may be treated as one incumbrance amounting to 90,000*l.*, and prior to that of the Reversionary Company.

Immediately after the execution of the deed whereby the annuity of the Reversionary Company was secured, and on the same day, Mr. Tynte, who was the owner of the fee, or rather the owner of the equity of redemption, created a further charge by conveying the property subject to the prior charges for 90,000*l.* and the annuity of 3,545*l.*, to two trustees, the present plaintiffs, as trustees for sale,—that must mean to sell what was conveyed, namely, the fee-simple having regard to the prior incumbrances, and out of the proceeds of the sale in the first place to pay all the costs of the sale, and then to pay off the incumbrances in their order, including two other mortgages posterior to that of the Reversionary Company, amounting to between 20,000*l.* and 30,000*l.*, and as to the ultimate surplus if there should be any, (in fact there was none at all,) for Mr. Tynte himself.

The trustees of Mr. Tynte, thinking it was their duty to pay off the subsequent incumbrances, (and they must for this purpose be treated as merely acting as agents for Mr. Tynte, or for Mr. Tynte and the subsequent incumbrances : in one or other of these lights they were certainly acting,) and considering how they could most expeditiously get the property sold to relieve Mr. Tynte from the pressure of this large annuity, write the letter of the 27th August, 1847, on which both parties have relied in support of their cases. The terms of that letter are important; it was written by the Messrs. Baker, the plaintiffs' solicitors, to the secretary of the Reversionary Company. (His lordship here read the letter, see *ante*, 425.) That letter was written in August, and being in the long vacation, and from the necessity of communicating with the board, remained unanswered for four or five weeks, but on 30th September, Messrs. Beavan and Anderson wrote to Messrs. Baker and Co. the letter which is the foundation of the plaintiffs' case, and it is material to consider what is the true interpretation of that letter. If that letter amounted to what is contended for on the part of the plaintiffs, no question about standing by or conduct can arise. The argument amounted to this, that that was a contract on the part of the company, or those entitled to bind the company, that they would concur in the sales intended to

be made. I think it amounted to nothing of the sort. Observe who their clients were. They were a company who managed their affairs by a board of directors and their secretary. Letters passed sometimes to the solicitors, but in regular course they passed to the secretary of the company, and were submitted to the board, and then to the solicitors, who seemed ultimately to have received the communication of the 27th of August, and to have written the answer on the 30th of September, which was as follows: "With reference to your communication to the secretary of the General Reversionary Company of the 27th of August, we think you had better let us have a copy of the trust-deed referred to by you, under which, as we understand, you contemplate making sales, in which you anticipate our clients may be called upon to concur." (That was the deed which was made behind the back, so to speak, of the Reversionary Company.) "When we have seen that deed, we shall be better able to inform you whether our clients will have any difficulty in joining in the conveyances." (Up to that time there certainly is no consent at all. They say, you tell us you are trustees under a deed to sell; when you send us a copy, we shall be better able to tell you whether we can advise our clients to consent. Then follows this passage): "We need not say, as far as we are concerned, we shall be ready to give you every facility in our power to whatever arrangements you may propose with regard to the sales." Following out the sentence as to what advice they would give to their clients, I cannot assume that that was meant to be any thing like a written consent, or that it amounted to any more than a courteous way between solicitors of saying: "Let us know what are the terms on which you are proposing to sell, then we will try and do the best we can for you. We are anxious to serve you as well as we can, and when we know what the deed is, we will see how far we can advise our clients to coöperate with you."

So matters stood, and nothing further was done until April 5, 1848. A portion of the property was near the town of Newport, and Mr. Farebrother, the auctioneer, being of opinion that it would be obviously for the interests of the vendor that it should be sold in building lots, and a necessary preliminary to that being that it should be surveyed and laid out with roads, the trustees considering how they could put themselves in funds to make those roads, took into their hands the receipt of the rents. They had kept down all the interest on the mortgages, and there remained in their hands, on account of rent, a small sum of £100, which was such a drop, as far as the Reversionary Company was concerned, that it was quite unimportant whether it was applied in payment of their arrears, or was otherwise applied. The Reversionary Company had not taken possession, but they had a power of distress, and they might have distrained for rent at any time; but they did not choose to distrain, knowing that Mr. Tynte, the grantor of their annuity, was by himself or those who claimed under him receiving the rents. They might not have been able to claim bygone rents, but the future rents they might interfere with without taking possession of the estate. Accordingly, the plain-

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tiffs' solicitors, by their letter of the 5th April, 1848, wrote, stating the difficulty they had about making the roads. They stated that they had that very small fund in hand, and that they proposed to apply it, together with the rents which would accrue up to the next midsummer, amounting to about 1,100*l.*, in making these roads; that they could not do so without the consent of the Reversionary Company; that the other incumbrancers had consented, and that it was for the common interest of everybody concerned in the estate to make the most of it, and under these circumstances they asked the Reversionary Company to give their consent. That was a most reasonable application. Mr. Walker infers from that, that the company must have known that the sales were made under the trust-deed; that they must have known it was not Mr. Tynte, but the trustees, who were making the sales. I think it very probable they did infer it; but I do not see, in my view of the case, that that bears very much on the principle which is to govern my decision. Mr. Walker's argument is, that inasmuch as the trust-deed was the only deed which authorized them to have the rent in their hands, the Reversionary Company must have known that the trustees were acting under that deed. Be it so; it was a matter of perfect indifference to the company whether Mr. Tynte was selling the estate, or whether it was conveyed to trustees. I dare say they knew it had been conveyed to trustees for sale. They knew there were incumbrancers after themselves, and they may very likely have thought it was conveyed to trustees to sell, to pay those subsequent incumbrancers. About a month, however, after Messrs. Baker's application, Messrs. Beavan and Anderson wrote to them as follows: "With reference to your letter of the 6th of April, addressed to Mr. Hodge, we beg to inform you that the directors of the General Reversionary Company are willing to forego the immediate payment of the arrears of rent now in hand, provided the subsequent incumbrancers' consent shall be obtained to the arrangement proposed in your letter; and we have to inform you that, on the part of Mr. Beavan, we have no objection to the course proposed, as we are satisfied that the making of the roads as contemplated will tend to increase the value of the property." I think that was a very reasonable letter to write. The inference I also think from it is very strong, almost irresistible, that they knew there were subsequent incumbrancers for whom the plaintiffs were trustees, and it clearly amounted to a consent that the rent in hand, and to accrue up to the midsummer following, should be applied in making the roads. Then there is another letter from Messrs. Baker and Co., stating that it was not only necessary to make the roads, but that there was an outstanding lease, the holder of which was trying to make very exorbitant terms, but informing the Reversionary Company that the plaintiffs had ultimately succeeded in obtaining the surrender of the lease for 542*l.*; that they had not got the sum requisite for the purchase, but that it would have in part to be advanced by the trustees, and desiring the consent of the Reversionary Company to that also. About a fortnight after, on the 28d of May, 1848, Mr. Anderson writes again: "Our clients are not dis-

posed to raise any objection to the application of the sum of 542*l.* towards the purchase of the tenant's interest."

Now, up to that time what does all which had taken place amount to? In my opinion to nothing more than that the Reversionary Company believed that the person who had created their incumbrance had probably created subsequent incumbrances, and was proceeding to a sale; and they knew that they had been asked whether they would consent to such sale, and that they had said we will give every facility we can, but before we do any thing we must see the deed. It was contended that they must have known the nature of the deed, because they were told it was the same as another deed stated in the abstract, which, if they had looked at their own abstract, they would have seen. But they wanted to know what the exact deed was. They said, in effect, we are perfectly content with matters as they are. We are going to offer no unreasonable obstacle to the course you propose, but show us the deed and then we may concur. In the mean time, you say it is necessary to lay out a sum of money which you have in hand and the subsequent rehts; do that, and we shall never call it in question if the other incumbrancers after us agree.

That being the state of things in May, 1848, it is not pretended that any thing else took place up to the time of the sale, except that it is said the particulars and conditions of sale were known to the solicitors of the Reversionary Company. Assuming them to have had notice of the conditions of sale, I am at a loss to know what they disclose. They merely disclose that they were selling as trustees, and claiming under Mr. Tynte, behind the back of the Reversionary Company.

After the sale had taken place nothing further was done until November, 1848. I should state that before that time the plaintiffs' solicitors wishing to complete the contracts, having sold a great number of small lots as quickly as possible, wrote to the solicitors of the company, saying: "We hope you will have your deed ready to be examined by the purchasers, because they will all want you to be conveying parties, and for that purpose they must look at your deed:" and this was assented to on the part of the Reversionary Company.

In the month of November, some drafts are forwarded for the approval of the company; and in those drafts, purporting to be conveyances of certain of the lots, the sale is stated to be in consideration of so much purchase-money paid to the prior incumbrancers, and to those drafts Mr. Anderson, on behalf of the company, assents. There is no objection. He takes it for granted that Mr. Tynte, or Mr. Tynte's trustees, as he calls them, are putting the property up for sale through Messrs. Farebrother, so as to get the most for it, and probably the most has been got for it. So it went on with one exception, with respect to all the conveyances, amounting to no less than forty in number. Of course, those deeds were all prepared by the respective purchasers. I may observe that on one occasion, when Messrs. Baker asked the solicitors of the company to give a general consent to all the deeds which should from time to time be sub-

mitted for their approval, they answered that the board declined to authorize, in the dark, an assent to any conveyance which they had not previously approved of. I dare say they had no intention of raising any difficulty about the sales, and that they intended only to say we do not consider ourselves bound to any thing; we wish to give you every facility, but it must be a consent *pro hac vice*. So matters proceeded down to the month of July, 1849. A great number of conveyances were assented to from time to time, all making the purchase-money payable to the prior incumbrancers. At that time a sum nearly sufficient had been received to satisfy the incumbrancers prior to that of the Reversionary Company, and in that state of things an application was made by Messrs. Baker, as the solicitors of the vendors, to Messrs. Beavan and Anderson, asking leave to retain a sum of money towards the expenses of the sale. So far as I can see that was the first time that any suggestion had been made to Messrs. Beavan and Anderson on the subject of the costs of these sales, or that any thing had occurred to lead them to suppose that the costs were to be borne by any other person than the person who had created the incumbrances, or the plaintiffs claiming under him. Whatever was said in the year 1849, or after the sales in 1848, is unimportant, except so far as it may throw light on what had been done or said prior to those sales; for that purpose it might be important, but certainly the letter of July, 1849, does not lead to the inference that the plaintiffs had been up to that time acting on the notion that they were to have the costs of the sale in priority to the incumbrance of the Reversionary Company; nor, indeed, that any thing had been done at a previous stage sanctioning that which was then asked for; it seems to be a thing for the first time brought to the attention of Messrs. Beavan and Anderson. They are in that letter informed that an arrangement had been entered into for enabling the trustees for sale to retain out of the purchase-moneys yet to be received for lots already sold 4,000*l.* on account of the trust expenses, which was to be applicable to the payment of the costs of the sales generally, including the costs of the Reversionary Company. On the 23d July, 1849, Messrs. Beavan and Anderson, by letter, signify a refusal on the part of the company to assent to such an appropriation of the purchase-money. I am of opinion, therefore, that up to that time there was nothing, as I have already stated, to bind them to assent to the sales which had taken place; and even if I were wrong about that, I am clearly of opinion that there was not any thing to bind them to allow the purchase-money to go in discharge of any costs, or in any other way than first of all in liquidating the prior incumbrances, and then in liquidating their own.

Thus matters stood at that time. All that passed afterwards is quite unimportant, unless there be something from which it can be inferred (in spite of the interpretation which the previous letters and conduct of the parties have led me to form) that the Reversionary Company did assent to the sale and the appropriation of the purchase-money as contended for by the plaintiffs. Without going into all the details of the case, I conceive there is nothing at all in the evi-

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*Ex parte Edleston.*

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of the statutes, granted by the letters-patent of her Majesty, was in precisely the same terms as the 41st chapter of the statutes of Queen Elizabeth.

The petition then stated that, on the 27th April, 1853, the Rev. W. Hepworth Thompson, M. A., then one of the fellows of the college, was elected Regius Professor of Greek in the university, and on the 11th June following, was, at his own request, duly sworn in and admitted to the office of Regius Professor of Greek by the vice-master of the college, and had since been instituted to the canonry in the Cathedral Church of Ely, and that he now held the office of Regius Professor of Greek in the university, and the canonry so annexed thereto.

The petition submitted that the said W. H. Thompson, upon his admission to the office of Regius Professor of Greek in the said University, ceased to be a fellow of the said college. The petition then stated that the master and seniors of the college, who, by the last-mentioned statutes, were the governing body of the college, had, however, continued to treat W. H. Thompson as an actual fellow of the college, and that he continued to receive the allowances and payments out of the college revenues to which he would be entitled if he had not been elected and admitted to the professorship; that, at the annual election of fellows in October, 1853, at which all vacant fellowships were required to be filled up, such vacant fellowships were filled up; but that W. H. Thompson's fellowship was not included in the number, there being seven fellowships vacant independently of W. H. Thompson's fellowship.

The petition then stated that the eight senior fellows of the college received a double dividend, and the eight fellows next to them in seniority also received a larger amount than the ordinary dividend of the fellows below them; that, in the month of November, 1853, a vacancy occurred in the number of senior fellows of the college, and that, on the 26th of November, 1853, the masters and seniors of the college elected W. H. Thompson as a senior of the college, to supply the vacancy in the office, and that on the following day he was sworn to the said office; that, in consequence of W. H. Thompson being allowed by the master and seniors to retain his fellowship, the petitioner, who was then seventeenth fellow, was postponed in his succession, not only to such increased dividend, but to college livings, to which the fellows succeed according to their standing in the college, and to other advantages dependent on seniority of standing in the college.

The petition prayed a declaration that W. H. Thompson, upon his admission to the office of Regius Professor of Greek in the university, ceased to be a fellow of the college, and that his election and admission as a senior fellow of the college was irregular and void.

The affidavit of the Rev. W. H. Thompson stated that, according to his belief, the letters-patent of Charles the Second were not issued at the instance or request of Trinity College; that a letter-patent accepted by the university or if not formally accepted, which had been acted upon by the university, had the same force and validity

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as a statute of the university; that since the letters-patent of Charles, the 41st statute of Elizabeth had never been enforced so far as regarded the number of lectures thereby prescribed, or the removal of a fellow from another college to Trinity College, in case of such last-mentioned fellow having been elected to either of the three professorships; or as regards the depriving a fellow of Trinity College of his emoluments in consequence of his election to either of the professorships of Hebrew or Greek; that he had accepted the professorship of Greek, in the belief that it would only be compulsory on him to perform the duties prescribed by the letters-patent of Charles, and that he should retain the emoluments of his fellowship, and that he therefore had resigned the office of tutor, the net emoluments of which exceeded 1,200*l.* per annum.

From the affidavit of the Rev. W. Whewell, it appeared that in 1540 King Henry the Eighth founded five public lectureships; namely, one of divinity, one of Greek, one of Hebrew, one of civil law, and one of physic, and endowed them with a perpetual stipend of 40*l.* each; that ever since they had respectively continued to lecture in the university schools, and that all members of the university had an equal right of attending the lectures; that Trinity College was founded in 1546; that in the same year King Henry the Eighth granted divers manors, lands, &c., to Trinity College, which body thereupon undertook to defray the stipends of the three Regius Professors of divinity, Greek, and Hebrew; that statutes for the government of the university were granted by Edward the Sixth in 1549, and contained provisions respecting the lectures on theology, Greek, and Hebrew; that statutes for the government of Trinity College, based on the preceding statutes of Edward the Sixth were prepared about 1554, whereby it was provided that the professorships of divinity, Greek, and Hebrew, should be appointed not by the crown but by the Vice-Chancellor and masters of the four principal colleges, and the two senior fellows of Trinity College; that Queen Elizabeth, in the first and twelfth years respectively of her reign, granted a body of statutes to the university, containing various provisions respecting the public lecturers of theology, Greek, and Hebrew, and the attendance of members of the university at their lectures; that in the second year of her reign, a body of statutes was granted to Trinity College, which were accepted and have been acted upon, with certain exceptions, ever since, up to the year 1844; that the letters-patent of Charles the Second were not issued at the request of Trinity College; that there was on the back of such letters-patent the following indorsement: "A patent granted unto the divinity, Hebrew, and Greek lecturers in the university. Hastings." That, after the issue of the letters-patent of Charles the Second, they were acquiesced in and acted upon by all persons to whom the same referred, and that divers fellows of Trinity College had subsequently been elected and admitted to the professorships, and continued to receive the livery and stipend, and all other emoluments receivable in right of the fellowship.

The affidavit stated that, in the year 1843, the master and seniors of Trinity College prepared a draft of statutes for the government of

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the college, and founded on the statutes of Queen Elizabeth, and preserving the order and greater part of the provisions thereof, but embodying therein certain alterations and amendments made from time to time by letters-patent granted by the crown at the prayer of the college, and proceeded: "I, and the eight seniors for the time being, did not alter the 41st chapter, as contained in the statutes of Queen Elizabeth, by consolidating therewith the provisions of the letters-patent of King Charles the Second, because we conceived that application for such a revised and amended statute ought not to be made to the crown by the college alone, without the concurrence of the university, and because we considered that the consent of the university to make a joint application for such revised statute could not be obtained without great delay, a belief justified by the fact, that the draft of a revised body of statutes for the university, though it has been for several years under the consideration of the university, has not yet been presented to the crown for its approbation and consent. In the draft so prepared by me and the seniors, no alteration whatever was made in the said 41st chapter of the statutes; and it was not my intention, nor as I believe the intention of the senior fellows of the college, for the time then being, to make or to attempt to make any change whatever in the emoluments, duties, or situation of the three public lecturers, as regulated by the 41st chapter, taken in conjunction with and modified by the letters-patent of Charles the Second; and on the contrary it was my intention, and as I believe the intention of the eight senior fellows for the time being, of the college, (with all of whom I had frequent communications respecting the preparation of the draft, in preparing the same in the terms which were ultimately adopted and ratified by her present Majesty,) to leave entirely unchanged and without any variation whatever, all the emoluments, rights, advantages, as well as the duties secured to, or imposed upon the three public lecturers by the 41st chapter, as modified by the letters-patent of Charles the Second. And we did not, either in consequence of two canonries of the Cathedral Church of Ely, by the act passed in the fourth year of her present Majesty, intituled 'An act to carry into effect, with certain modifications, the report of the commissioners of ecclesiastical duties and revenues,' having been directed to be annexed and united to the Regius professorships of Hebrew, and Greek or for any other reason whatever, intend to deprive any fellow of Trinity College, who might thereafter be appointed Regius Professor of Greek, or Hebrew, of his right, under the letters-patent of Charles the Second, to retain the emoluments and advantages of his fellowship or in any other way to alter, or affect the rights or duties of the three Regius professors of divinity, Greek, and Hebrew, or any of them; and at the time when the draft containing the 41st chapter unaltered was agreed to by myself and the eight seniors, and at the time when the revised statutes (granted and ratified by the letters-patent of her present Majesty) were received and accepted by us, I conceived that the words 'patre nostro charissimo,' being retained in the statute immediately after the words 'Rege Henrico Octavo,' and the provisions of the same statute, without the modifications intro-

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duced by the letters-patent of King Charles the Second, being in many respects burdensome, unsuitable, and even absurd if applied to the present time, it would evidently be the intention of the letters-patent of her present Majesty, not to reenact the 41st chapter as of the present time, but to retain it merely as modified by the subsequent letters-patent of Charles the Second, which I then believed and still believe to be equivalent to a statute of the University of Cambridge, and not to be a statute, or ordinance for the government of Trinity College only, and therefore irrevocable, without the consent of the university. And I, and as I believe the seniors, retained the words 'patre nostro charissimo,' intentionally in the draft, in order to mark more strongly that the said statute was to be considered as taking effect from the time when it was originally granted and was subject to the alterations made by the letters-patent. I believe that if all the provisions of the 41st chapter, unmodified by such letters-patent, were strictly enforced, it would not be possible to find duly qualified persons who would accept the office of Regius Professor of Greek or Hebrew, or even divinity. I, and the eight senior fellows of the college for the time being, taking into consideration the facts I have stated, with respect to the grant of the body of statutes by her present Majesty, and the power conferred upon us to interpret the statutes by the 46th chapter thereof, decided, shortly after the Rev. W. H. Thompson was elected and admitted Regius Professor of Greek, that his fellowship had not thereby become vacant, and subsequently he was reckoned as entitled to the same dividend or share of the surplus revenues of the college, and all the usual emoluments and advantages of a fellow of the college, as if he had not been elected and admitted such Regius Professor."

The 41st statute of Elizabeth contained the following passage: "Hujus statuti unum exemplar sit inter statuta dicti Collegii, et alterum in libro de statutis Academiæ descriptum." The letters-patent of Charles the Second were not embodied in the statutes either of Trinity College or the University. Dr. Ferne was the Vice-Chancellor, and also Master of Trinity at the time when the letters-patent were granted; and (whether owing to that circumstance or otherwise it did not appear) the letters-patent themselves were preserved in the college treasury.

Various portions of the statutes of Elizabeth were commented upon in the course of the argument; but as the particular passages which have most bearing on the question are cited in the judgment, it has been deemed unnecessary to make any further allusion to them either in the statement or argument.

*Rolt and Denison*, in support of the petition.

Any statute affecting to deal with the constitution of a college must be assumed to be a college statute; but we submit, that whether the letters-patent of Charles be regarded as a college statute or not, the same result will follow; in the former case, *cadit questio*, and in the latter they must be held to be repealed, at least so far as they were binding on the college. It surely is not incompetent for

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one corporation, though subject jointly with another to certain rules, to make by-laws, the effect of which will be binding on itself: thus, for instance, while there is nothing to prevent a member of St. John's being a fellow of Trinity, yet Trinity might make rules and by-laws which would have the effect of excluding a member of St. John's from holding the fellowship and continuing a member of St. John's. In the present instance, the respondent clearly and voluntarily accepted the office long after the passing of the Act 3 & 4 Vict. c. 113, and he cannot be heard to say that he is not bound, and that the canonry has been forced upon him. The mere fact that the recent statutes granted by her Majesty were accepted by the master in a different sense than that which their language plainly imports, cannot alter their effect.

*Baily and De Gex*, for the respondent, the Reverend W. H. Thompson.

It is clear that the professorships were university offices, involving the discharge of duties to the university at large, and open to the competition of all the colleges, and in existence previously to the foundation of Trinity College; the professors were appointed not by Trinity College alone, but by the whole university; the stipends for these professorships were in the first instance provided by the crown; and though the payment was subsequently made, by the college, yet it was only because the lands originally chargeable with such stipends were granted to them by the crown. The statutes of Elizabeth, as well as the letters-patent of Charles, were clearly university statutes; a copy of the former was expressly directed to be kept in the archives of the university, and the latter was specially indorsed as granted to the lecturers in the university; they were neither of them addressed to Trinity College alone, but to every one who was or could be interested. We submit, that the letters-patent of her Majesty are only applicable to the repeal of the statutes, ordinances, and decrees for the government of the college, and it was altogether without the scope of the college's authority to deal with the letters-patent of Charles, affecting as they did university offices. The petition prays a declaration that Mr. Thompson ceased to be a fellow on his acceptance of the professorship; that certainly cannot be granted, as the 41st statute especially contemplates the resumption of the fellowship, with all its emoluments, on vacating the professorship; and, inasmuch as the clause as to the retention of the name only of a fellow, does not expressly point at a loss of seniority, or to a forfeiture of the surplus dividends, it ought not by implication to receive such a construction.

*Malins and Birkbeck*, for Trinity College.

The canonry not having in fact been added to the professorship for a period of upwards of nine years after the passing of the Act 3 & 4 Vict. c. 113, had the incumbent of the canonry lived for ninety years, it follows, according to the construction of the petitioner, that the professorship of Greek would have had no other emoluments in

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respect of that professorship than 40% a year during the whole period of the then existing incumbency. The petitioner took his fellowship, subject to those above him obtaining the Regius professorship of Greek, and while the letters-patent of Charles were in existence, how can he under these circumstances, and in this form of proceeding, be heard to complain? In the 46th statute is the following clause: "Si quid ambigui in his statutis reperiatur id iudicio Magistri et majoris partis octo Seniorum semper dirimatur." It follows, therefore, that the interpretation put on these statutes by the master and senior fellows, acting on their honest apprehension, must be assumed to be correct; nor indeed would their decision, under such circumstances, be disturbed by any visitor; *Case of Queen's College*, Jacob, 1; see p. 37. The 41st chapter of the statutes of Elizabeth being reenacted, only takes its place from the time of Elizabeth, and leaves the letters-patent of Charles unaffected; *Shipman v. Henbest*, 4 Term R. 109; see p. 114; *Williams v. Rougheedge*, 2 Burr. 747; *Bayly v. Murin*, Vent. 244. On an analogous principle, where a will has been revoked by one codicil and reëxecuted by another, the latter has not the effect of repealing the revoking codicil.

*Rolt*, in reply, waived so much of the prayer of the petition as sought a declaration that the respondent ceased to be a fellow on acceptance of the professorship, and asked a declaration that, in that event, he ceased to be a fellow except in name only, and as a consequence, that he should be excluded from the seniority or perception of any share in the revenues of the college. He submitted that neither the mode of electing the professors nor the fact of the professors having duties to discharge to the university, constituted them officers of the university; and that, as to the professorships being open to members of all colleges, this was common ground, though, if a fellow of another college were elected professor, the petitioner's contention would be most reasonable. He also submitted that there was no evidence whatever that the statutes of Elizabeth or Charles were entered as university statutes in the books of the university.

The LORD CHANCELLOR, (LORD CRANWORTH.) Though this is a very important case, it lies in a narrow compass; from the time it has occupied in argument, I have been able to turn the matter over in my mind, and feel competent and warranted to deal with the question now, and I may here observe that it is a question on which I entertain no doubt whatever. It comes before me as called on to advise her Majesty on a petition presented by one of the fellows of Trinity College, praying a declaration that Mr. Thompson upon his admission to the office of Regius Professor ceased to be a fellow of the college, and that his election and admission to be senior fellow was void. Under no circumstances could the application to that extent be just; but that can be corrected by introducing the words of the 41st chapter of the statutes of Elizabeth. It is clear that, looking at the college statutes of 1844, which in terms embodied that 41st chapter, if we are to be guided by them, the petitioner is

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right in his contention, and that Mr. Thompson, by his acceptance of the Regius professorship, became "*Socius nomine tantum*."

The only question is as to whether these statutes exclusively regulate the rights of the parties. There can be no doubt but that the crown being visitor of Trinity College, the college might, by surrender of its statutes or charter, obtain new statutes, subject to any trust that might be engrafted on them. The college did that in 1844, and new statutes were granted. By those statutes, Mr. Thompson, being elected Greek Professor, would cease to be a fellow, except in name only. Have those statutes that effect or not? It is said they have not, for these reasons. The origin of the professorship was in the time of Henry the Eighth, who founded five professorships at Oxford and five at Cambridge. With three only of the latter have we any thing to do, namely, the professors of Greek, Hebrew, and divinity. Certain property belonging to the crown from the Abbey of Westminster was charged with the expense of maintaining these professorships; and afterwards the stipulation was, that Trinity College, the property having been made over to them, should pay 40*l.* a year as a stipend to each of these three professors.

So that matter stood until the reign of Elizabeth, when a new body of statutes was granted, which, subject to the exception to which I shall advert, have governed the college down to a recent period, and in those statutes was a regulation as to electing the professors, and the payment of a stipend of 40*l.* a year out of the college revenues. It was made part of that regulation, the election not being by the college, but by the master and two senior fellows, joined with the Vice-Chancellor and three other functionaries of the university (that is, three electors in the college, and four out of the college,) that if any fellow should be elected to any one of the professorships, he should cease to be a fellow: he was to retain the name only; if he ceased from any cause to be a professor, he was to be restored to his rights of fellow; if he was a senior fellow, he was to cease to be so except in name, retaining, however, some small advantages — the right of having a sizar as an attendant, and his chambers — *cubiculum*. If, then, Mr. Thompson had lived in the reign of Queen Elizabeth and not in the reign of Queen Victoria, he would have lost his fellowship, and would have had his 40*l.* a year. Why is that not to be so now? for the 41st chapter of the present statutes contains the same words as that of Elizabeth, retaining even inaccuracies, such as speaking of Henry the Eighth as "*our late father*," though the person speaking is her present Majesty. What is said, however, in answer is, that between the statutes of Elizabeth and those of Victoria there were granted letters-patent, by Charles the Second, which altered the then existing regulations, and made certain provisions for the benefit, not of Trinity College alone, but of the whole university; and that no statute ordained for the government of the college can affect the rights of the university. Let us see how this is. I assume it to be clear that, by the statutes of Elizabeth, Mr. Thompson would have lost his fellowship, subject to the trifling advantages already alluded to. Is that altered by the letters-patent of Charles the Sec-

ond? Those letters-patent, reciting the 41st chapter of the statutes of Elizabeth, proceed to say: ‘Nos igitur hominum academicorum præsertim publicorum in academiâ professorum commodis prospicere cupientes ex supremâ nostrâ rigiâ potestate certâ scientiâ et mero motu dictas clausulas seu sententias superius a nobis recensitas annullamus et cassamus in quantum concernunt præscriptum illum numerum lectionum et sodalitiî amissionem. Et quo æquior sit inter mercedem et laborem proportio statuimus quod Socius dicti nostri collegii si electus sit ad locum Lectorum linguæ Hebraicæ vel Græcæ (nam Theologiæ professorem excipimus propter annexum satis opimum sacerdotium) non tenebitur ex hoc tempore sodalitiium suum deponere.” Supposing it had stopped there, the statutes of Trinity College would undoubtedly have to be read from that time as if there were no provision in them for the loss of the fellowship.

What, however, is the meaning of that instrument, and how is it affected by the letters-patent of her present Majesty confirming the revised statutes and revoking all other statutes and ordinances of the college? Mr. Malins pressed on me language supposed to have fallen from Lord Eldon in the case of Queen’s College, Jacob, 1; see p. 37, which, however, I have not been able to apply to the present case, to the effect that, in construing the statutes of a college as visitor, I must look at them in a more liberal way than if construing a statute at law or in equity. This I felt at the time I could not assent to. My duty in construing a college statute or other instrument, is to find out the meaning of the words used, and the meaning must be collected in the same manner in the one case as in the other. Neither do I assent to my having a right to look to extrinsic evidence in any other way than is usually done. The intention, then, of the letters-patent of Charles, was to place the professors of Hebrew and Greek in the same position as if the disabling clause in the 41st chapter had not existed. I much question if the grant of the letters-patent was any thing more than an act of that dispensing power which at that time, either rightly or wrongly, was exercised by the sovereign, and which, in the case of universities, led to those great constitutional questions which took place. Lord Eldon alluded to this in the case of Queen’s College, Jacob, 1; see p. 37, as having been very usual, and I cannot but think that this was merely an exercise of royal power to render unnecessary the compliance with the provisions of the previous statute. I do not, however, think this important, for if the crown had made a grant, and the college had acquiesced in it for two hundred years, this would have been evidence enough to show an alteration of the original statute. What, however, is more material is, that it is said that the grant was in favor of the university, and that therefore the crown could not alter it without the consent of the university, and that the university has never consented. I confess I cannot come to that conclusion, and I do not think that in any sense it was a statute of the university. It is a statute which the university has an interest in seeing carried into effect, but I do not understand in what possible sense it is a grant to the university.

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Then, that being so, what is the effect of the new statutes of 1844? The effect seems to be clear that they in terms get rid of the dispensing statute of Charles; for after stating that the master, fellows, and scholars of the college had represented that Queen Elizabeth had given the body of statutes before mentioned or recited to the college, for the government of the same, and that divers of her Majesty's successors had in their care for the said college issued their letters-patent directing certain changes in the said statutes, (that is, just as if the letters-patent of Charles had been here mentioned,) and the said college had been governed by the said statutes, so from time to time changed and altered, it enacts: "We do of our especial grace, &c., revoke and make void all statutes, &c., made and given for the government of the said college, and the respective members thereof, before the date of these presents." As far then as the college is concerned, there is, to my mind, no doubt but that the letters-patent of Charles the Second were by this means annulled. We thus come to the new statutes, embodying in terms the 41st chapter of the statutes of Elizabeth, depriving of his office the fellow who accepts the office of *Regius Professor*.

I asked in the course of the argument what was meant by an university statute, but got no very satisfactory answer. It was said that the rights of the university would be affected by getting rid of the letters-patent of King Charles, but I do not think so. It may well be that the new statutes in no way affect the obligation of the college to set in motion the election of the professors. In one sense the university has an interest in the statutes of Trinity College, and the crown could not relieve the college of the duty of charging their revenues with the stipend and electing the professor. In that sense it is a statute in which the university has an interest, and if the crown had annulled the payment of the 40*l.* or the election of the professor, the university might have come by *scire facias* to have the letters-patent repealed. But what is said is, that the new regulations have not given the university so much as they would have had if the former letters-patent had remained in force, though in fact the extent to which the university has an interest in these professorships is limited to a voice in the election of the professor and the payment of his stipend; but this is no cause of complaint. It appears to me, therefore, to be a matter admitting of no doubt, that the letters-patent of Charles the Second were revoked by the letters-patent of Victoria, and that the matter must be treated as if there were no such instrument as the former in existence.

What then is the consequence? The petition, as I have already observed, is wrong, in so far as it prays that Mr. Thompson on his admission to the professorship ceased to be a fellow; he must remain a fellow though in name only, and must have such benefits as are granted by the statutes of her present Majesty. But it is said, that though he is removed to this extent from being a fellow, he is still entitled to seniority and entitled to a share of the surplus dividends. I think neither of these propositions tenable. It was argued that he is not eligible to seniority, because seniority is an office; that may or

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may not be a valid argument, but what seems to me to be stronger is the language of the 11th chapter of the existing statutes, which says: "Statuimus porro et decernimus, ut Seniorum electio intra novem dies ad summum post locum vacantem fiat: sitque ista horum eligendorum forma. Cum Senioris alicujus vacet locus Magister vel eo absente Vice-magister convocatis in sacello, ut dictum est, illis Senioribus qui reliqui sunt, cooptet in eum cœtum Socium illum qui sit proxime senior, &c." I cannot think that any one *Socius nomine tantum* is eligible into the seniority, and it is equally clear that he is not entitled to share in the dividends. I think it would be so even if there were not the expressions, to which I will now refer, at the end of the 33d chapter: "Pecunia autem quæ supersit ex consensu Magistri et majoris partis octo Seniorum inter Magistrum Socios et Sacellanos pro rata cujusque portione juxta consuetudinem usu jamdiu receptam distribuatur." It is thus the *Magister Socii* and *Sacellani*, who are to share; but Mr. Thompson cannot be in this sense a *Socius*, for then he would not be a *Socius nomine tantum*. By this express clause he is excluded, even if on a more general view of the matter he was not, from the benefits of the fellowship, and among them seniority, and any share of the surplus dividends.

I arrive at this conclusion with as little doubt as I ever felt on any subject, though with some reluctance, as it may be at variance with the interests of learning and literature, and with what was the intention of the college. I have, however, only one straightforward course to follow.

One matter remains, that of costs, on which it appears to me I ought to do as Lord Eldon did in the case of Queen's College, Jacob, 1, and other similar cases before him. I think it was right that this question should have been brought here, and the costs of all parties will therefore be borne by the college.

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DAWSON v. JAY; *In re* MARY JAY DAWSON, an Infant.<sup>1</sup>

April 1 and 3, 1854.

*Infant — Jurisdiction of Lord Chancellor as to Infant Ward going out of England.*

Although the court will under special circumstances allow an infant ward to go out of the jurisdiction, yet it will not compel the removal of an infant ward out of the jurisdiction.

An infant, being a British subject and also an American citizen, and having lost both father and mother, was brought over to England from the United States, where her property was situated, by a paternal aunt with whom she resided; an application was then made by a maternal aunt, who had been appointed her guardian by the court in America, to have the

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<sup>1</sup> Before the Lord Chancellor, (LORD CRANWORTH.)

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custody of the infant delivered to her with the view of taking the infant back to America. The Lord Chancellor refused to interfere, being of opinion that he had no right to make such an order, even if on other grounds he had thought proper to accede to the application.

THIS was an application on behalf of Mary Jay Dawson, an infant of the age of eleven years, suing by W. Mac Donald, her uncle and next friend, to discharge a certificate made in the cause and matter by the chief clerk of Vice-Chancellor Stuart, which had been approved by his Honor, the effect of which was to direct Miss Mary Ann Dawson, one of the paternal aunts of the infant, and with whom the infant was living in this country, to deliver up the custody of the infant to Miss Elizabeth Clarkson Jay, one of the maternal aunts of the infant, who intended to take the infant to reside with her in the United States. The following statement will explain how the question at issue arose.

The infant, M. J. Dawson, was the daughter and only surviving child of William Dawson, late of the city of New York, and of Sarah Dawson, both deceased. W. Dawson was born in England, but went at a very early age to reside in the United States, and in 1824 he took the necessary steps and became a naturalized citizen; in 1825 he established himself in business in the city of New York, and subsequently married there, Sarah Dawson, an American lady possessed of considerable property; he continued to reside in New York down to the time of his death. The infant was born in New York, in November, 1842; S. Dawson died in 1846; and W. Dawson died in March, 1852, intestate.

At the time of his death, W. Dawson had two sisters, namely, Miss Mary Ann Dawson and Miss E. G. Dawson, who resided with him; he had also a brother, Mr. Frederick Dawson, settled at Baltimore, in Maryland, and another brother, Mr. Robert Lee Dawson, living in England; these individuals, together with L. Mac Donald (another sister of W. Dawson) the wife of W. Mac Donald, (the next friend,) and Mr. Pudsey Dawson, a cousin of the infant, both of whom were resident in England, were the nearest relations of the infant on the paternal side. On the maternal side, the infant had several uncles and aunts all resident in New York or the neighborhood, and persons of great wealth and respectability; Miss Jay was one of those aunts. The infant, as heiress of her mother, was entitled to considerable property wholly situate in the city of New York, consisting of freehold land and of a sum of money (7,000 dollars) invested on mortgage at seven per cent. W. Dawson left only personal estate, and to a small amount. The education and bringing up of the infant had since her mother's death been entirely under the management and superintendence of her two paternal aunts, Miss E. G. Dawson and Miss M. A. Dawson, who from that time had resided with her father. It appeared that according to the laws of the State of New York, the infant, if of full age, would have been entitled on the death of her father to claim the administration of his estate, and that by the same laws the guardian of an infant was entitled to claim the administration of all estates of which the infant, if of full age,

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would have been entitled to claim administration, and further, that at the request of such guardian, any other person might be joined in the administration.

On the 14th June, 1852, Mr. R. L. Dawson, having come to New York, applied, with the concurrence of Mr. F. Dawson, to the surrogate of the city and county of New York, to be appointed guardian of the person and estate of his niece. This application was opposed by Miss Jay, who, together with the other maternal relatives, was very anxious that the infant should not be removed from New York for her education during her minority; and the surrogate, in consequence, refused the application. A good deal of negotiation then took place between the members of the two families, which terminated in an arrangement under which Miss M. A. Dawson was, on the 21st June, 1852, with the concurrence of Miss Jay and the other maternal relatives, appointed guardian of the infant; and subsequently, Mr. R. L. Dawson was appointed jointly with her administrator of the estate of W. Dawson. The concurrence of the maternal relatives was given in consequence of an engagement entered into by Miss M. A. Dawson, which was reduced into writing, and was in the following terms: "New York, June 30, 1852. So long as I am guardian to Mary Jay Dawson, whether till she is fourteen or afterwards, if she elect me as her guardian at that age till she is twenty-one, I promise to bring her up in the United States, teaching her to consider it as her home, paying only an occasional visit to England. Mary Ann Dawson."

In the beginning of July, 1852, Mr. R. L. Dawson and Miss M. A. Dawson left New York, taking the infant with them, and went to Baltimore, on a visit to Mr. F. Dawson. They there found that, on the 10th June, 1852, Mr. F. Dawson had obtained himself to be appointed by the orphans' court of Maryland, guardian of the infant. Upon learning this, Miss M. A. Dawson immediately wrote a letter to Miss Jay, informing her of what had taken place, and stating that, under these circumstances, the engagement entered into by her, Miss M. A. Dawson, could not be carried out, the guardianship of the infant no longer belonging to her.

On the 4th August, 1852, Miss M. A. Dawson returned with her niece to New York; and on the 6th August, 1852, Miss Jay instituted a suit in the supreme court of the State of New York to obtain the removal of Miss M. A. Dawson from the guardianship, and the appointment of herself to be guardian instead. In this suit an injunction was at once obtained, restraining Miss M. A. Dawson, and also Mr. R. L. Dawson and Mr. F. Dawson, from removing the infant from the State of New York. Before, however, this injunction was served, the infant had been removed, and was subsequently sent to England, where she arrived in October, 1852. (The circumstances attending this removal and sending to England were variously represented by the different parties, but it was hardly denied that the intention of the proceeding, by whomsoever executed, was to place the infant out of the power of Miss Jay.) Miss M. A. Dawson herself shortly afterwards left New York and came to England. On the 2d

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October, 1852, an order was obtained on the petition of Miss Jay from the surrogate of New York, revoking the appointment of Miss M. A. Dawson to be guardian of the infant, and appointing Miss Jay guardian in her place.

In the latter end of 1853, Miss Jay came to England for the admitted purpose of obtaining possession of the infant, with the view of taking her back to America; and she accordingly presented a petition in the matter, setting forth, among other things, the facts above stated, and praying that she, or some other proper person, might be appointed guardian. In 1854, the present suit of *Dawson v. Jay* was instituted, the bill in which prayed an account against Miss Jay of the real and personal estate of the plaintiff, and that guardians of the plaintiff might be appointed, and a suitable allowance made for her maintenance; and in this suit a petition was presented by the plaintiff praying that Miss M. A. Dawson and Mr. Pudsey Dawson might be appointed her guardians, and for maintenance. It may be here stated, that from her arrival in England down to the institution of the suit, the infant had resided with different members of her father's family, under the care of Miss M. A. Dawson and Miss E. G. Dawson, to both of whom it appeared that she was much attached.

The two petitions, namely, that of Miss Jay and of the plaintiff, came on to be heard before Vice-Chancellor Stuart; and on the 4th March, 1854, his Honor, after seeing and conversing with the infant, as well as with Miss Jay and Miss M. A. Dawson and other relations, made an order appointing Miss Jay, Miss M. A. Dawson, and Mr. Pudsey Dawson, guardians of the infant, and directing the usual inquiries to be made in chambers as to the age, fortune, and relations of the infant, with liberty to the guardians, or any of them, to propose a scheme for the residence, maintenance, and education of the infant.

The inquiries directed by this order were proceeded with before the Vice-Chancellor's chief clerk, and proposals as to the residence and education of the infant were carried in on behalf of Miss Jay on the one side, and of Miss M. A. Dawson and Mr. Pudsey Dawson on the other. The main difference between the two plans was this: Miss Jay proposed to take the infant with her to America to educate and bring her up there, and the other guardians proposed that she should continue to reside as she had hitherto done under the care of Miss M. A. Dawson, with a suitable provision out of her fortune for her maintenance and education.

Before the result of the inquiries directed before the chief clerk had been ascertained, the Vice-Chancellor, on the application of Miss Jay, made an order<sup>1</sup> dated the 27th March, 1854, ordering Miss M. A. Dawson to deliver the infant to Miss Jay, to remain with her till further order. This order was immediately served; but, in consequence of the great opposition made by the infant to leaving the

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<sup>1</sup> The grounds on which this order was made had reference solely to alleged circumstances of conduct in the parties, and had no bearing on any legal question in the case.

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residence of Miss M. A. Dawson, it was found *unadvisable* to carry it into execution.

On the 29th March, 1854, the plaintiff applied to the lords justices to discharge the last-mentioned order; and their lordships directed that, without prejudice to the settlement of the scheme or any other question, the infant should not be removed from her present custody without the leave of the Lord Chancellor, or lords justices; and that the appeal should, as to every thing else, stand over.

On the 30th March, 1854, the Vice-Chancellor's chief clerk certified the result of the inquiries made in pursuance of the order of the 4th March, 1854; he certified, among other things, that it was proper that 200*l.* a-year should be allowed for the maintenance and education of the infant during her minority out of the income of her property vested in Miss Jay, as guardian under the order of the court in New York, and that it would be fit and proper, and for the benefit of the infant, that Miss Jay should be at liberty to remove the infant with her to New York, there to remain with her for her residence and education till further order, Miss Jay first giving security to obey the orders of the court as to returning the infant to this country when required, and to account for her fortune. This certificate was approved by the Vice-Chancellor.

From the certificate of the chief clerk, so approved, the plaintiff appealed. The matter was to have been heard before the lords justices, but in consequence of their lordships being engaged at the judicial committee of the Privy Council, and it being absolutely necessary for Miss Jay to leave England on the 5th April to return to New York, the Lord Chancellor appointed the parties to attend him at his private house.

The *Solicitor-General*, Bacon, and Cairns, supported the appeal.

*Wigram* and *Lawford*, were for Miss Jay.

THE LORD CHANCELLOR,<sup>1</sup> (LORD CRANWORTH.) I have looked through the whole of the papers in this matter, and I have had all the facts before me; it is a case very unpleasant to deal with, but I feel no doubt as to the course I ought to pursue; I am not called upon to determine any thing as to the conduct of the parties in causing this young lady to be brought from America to England in the manner they did; I have only to direct what is now to be done. This young lady I must take, to all intents and purposes, to be a British subject; she is an orphan, having neither father nor mother; she has however, and this is not complained of, three guardians, two of them being relations on her father's side, an aunt and cousin, and the other, her maternal aunt, an American lady of the highest respectability and of the best connections in that country; the property of

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<sup>1</sup> This judgment was delivered by the Lord Chancellor in his private room at the House of Lords.

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court;) and that Miss M. A. Dawson and Mr. Pudsey Dawson shall until further order pay the same when received, after deducting the yearly sum of 200*l.*, to be applied for the maintenance and education of the infant, into court to the credit of the cause. I reserve the question of costs, and all parties are to be at liberty to apply, — I was going to add the words: "as to permitting the infant to make any temporary visit to the United States, or otherwise, as they may be advised;" but I think I had better not anticipate any such circumstances.

*Wigram.* It might be advisable, perhaps, to insert them, as it might encourage Miss Dawson to take her to America.

The LORD CHANCELLOR, (LORD CRANWORTH.) In reference to a remark that has been made as to Miss Jay resigning the guardianship, I have thought of it, and I do not think that I should allow her to do so. I have no doubt she will conduct herself with perfect propriety on the subject of the money; but, of course, a material ingredient in giving or not giving her costs, will be the consideration whether she affords facilities for transmitting the child's fortune from the United States. I would have taken more time to consider this case, if the parties had wished it; but I am perfectly sure that I could arrive at no other conclusion than what I have now stated, though a little further time might have enabled me to put my judgment in a more condensed form.

*Wigram.* I think we understand it, my lord. Your lordship's view is, that the child must permanently remain here, unless it should be thought desirable, with the concurrence of the English guardians, that she should make a visit to America.

The LORD CHANCELLOR, (LORD CRANWORTH.) I believe Lord Eldon is reported to have said, that under no circumstances would the court allow a ward to be taken out of the jurisdiction; but I do not agree with that. I am to deal with the child as a parent would; but subject to the qualification, that I have no right permanently to divest myself of the control over the child, which I should be doing if, in this instance, I were to send her out of the country. With regard to the temporary visits to America, I should think it the most desirable thing possible, if I could reasonably secure that the child would come back again; and the difficulty I have is, how to do that.

*Wigram.* There is a suit pending in America, and no doubt the sanction of the court in that suit might be obtained to her returning.

The LORD CHANCELLOR, (LORD CRANWORTH.) I think it most likely that the court in America would not allow a temporary visit

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to England, unless it had the security of the court here; and I think I must act towards the court in America, as I have no doubt it would act towards this court.<sup>1</sup>

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GANN v. GREGORY.<sup>2</sup>

May 3 and 25, 1854.

*Probate of Will with Erasures — Legacy — Construction.*

The Ecclesiastical Court granted probate of a will of personality, with cross lines drawn in ink over the bequests of certain legacies: —

*Held*, on a claim raised by the parties interested in these legacies, that the will must be taken to have been executed after the cross lines were drawn, and that the only question was, what was the meaning of the testator, and that this was, that the legacies were not to stand part of the will.

THIS was an appeal by the defendant, Margaret Gregory, as administratrix with the will annexed of the estate of John Thompson, from a decision of Vice-Chancellor Stuart, on the 3d May, 1853, disallowing exceptions taken by the appellant to the report of the Master, dated the 20th December, 1852, whereby he had certified, among other things, that certain legacies were given by the testator's will, which the appellant submitted were not given, on the ground that it appeared by the will, and the probate copy thereof, that the said legacies were contained in the second sheet of the will, in which second sheet there appeared divers cross lines, obliterations, erasures, alterations, and interlineations, by the effect of which the said legacies must be taken as struck out from the will, or rendered uncertain, unintelligible, and void. The facts were as follow.

The testator, John Thompson, died on the 6th March, 1843; and soon afterwards two several documents were produced, each being alleged to be his will; one was dated the 22d February, 1843, and the other the 5th March, 1843. The latter document consisted of three sheets of paper; the second sheet contained a variety of legacies and directions to his trustees, &c.; some of these were altered in pencil, (for example, in one place, the name of Willis was altered into Ellis,) and the whole of the sheet appeared crossed out by means of diagonal lines in ink, with the exception of certain legacies to individuals.

Proceedings were taken in the Prerogative Court of Canterbury as to the two documents, the result of which was, that on the 20th June,

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<sup>1</sup> The minutes of the order were drawn up, and settled by the registrar, in conformity with the judgment of the Lord Chancellor, the words "as to permitting the infant to make any temporary visit to the United States or otherwise as they may be advised," being added to the "liberty to apply."

<sup>2</sup> Before the Lord Chancellor, (LORD CRANWORTH.)

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1846, a decree was pronounced, by Sir H. J. Fust, for the force and validity of the will as contained in the document of the 5th March, 1843, "with the several alterations, interlineations, and erasures appearing therein;" and, on the 16th March, 1847, letters of administration with the will annexed, "as the same now stands," were granted to the defendant.

On the 15th May, 1849, a legatees' suit was instituted for an account and for payment of the legacies and annuities given by the will; and a decree was made on the 15th July, 1851, directing a reference to the Master to take an account, in the usual way, of legacies and annuities.

The Master made his report, dated the 20th December, 1852, certifying that the testator had, among other legacies, given the legacies which were brought in question by the present appeal; they were the legacies over which the cross lines had been drawn, as above mentioned. The defendant excepted to the Master's report; and the matter was heard by Vice-Chancellor Stuart, on the 3d May, 1853, when his Honor overruled the exceptions. The Vice-Chancellor relied on the case of *Cooper v. Bockett*, 4 Moore's P. C. Cases, 419, the decision in which was to the effect that, in the absence of evidence, the presumption must be that the lines drawn across the will were made after the execution of the will; and, being of opinion that the Ecclesiastical Court had left the question of what construction was to be put on the cross lines being drawn over the legacies, open to the decision of the Court of Chancery, his Honor held that the lines were not so drawn as under the late act (1 Vict. c. 26) amounted to an alteration of the will, in respect of the part underneath the lines. From this decision the defendant now appealed.

*Bacon and Murray*, for the appellant. The lines must be assumed to have been drawn across the will before, and not after, its execution by the testator. The case of *Cooper v. Bockett*, 4 Moore's P. C. Cases, 419, does not apply, because there the probate was granted without the alterations, the Ecclesiastical Court having thus determined that they were not part of the will. Here, the Ecclesiastical Court has, by granting the probate in *fac simile*, held that the alterations were made before the execution of the will, and left it to this court to put a construction upon them. That construction, we contend, must be that the testator did not intend the legacies crossed through to be part of his will. The provisions of the act 1 Vict. c. 26, as to alterations cannot be referred to, for the form of the probate excludes any argument on that point. They referred to *Mence v. Mence*, 18 Ves. 348; *Francis v. Grover*, 5 Hare, 39; *Shea v. Boschetti*.<sup>1</sup>

*Wigram and Berkeley*, in support of the decision of the Vice-Chancellor. This court is placed in considerable difficulty by what the Ecclesiastical Court has done, and the only meaning that can be

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<sup>1</sup> Before the Master of the Rolls, February 15, 1854, not reported.

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given to the *fac simile* probate is, that all the legacies that are legible are to remain parts of the will; what other reason is there for leaving the lines?

[The LORD CHANCELLOR. They may be left to show the meaning of the testator; suppose, for example, a case of this kind,—a testator says: "I give A. B. an annuity of 500*l.*, and I give him also 1,000*l.*," and he then strikes out down to and including the words "500*l.*"]

This court may look at the original will to aid it in coming to a decision on the point of construction. *Philipps v. Chamberlaine*, 4 Ves. 51; *Compton v. Bloxham*, 2 Coll. 201; *Walker v. Tipping*, 9 Hare, 802, note (b.) It would be seen here that the pencil alterations made in the legacies, contained under the cross lines, must have been made after those lines were drawn, and if so, the inference must be, that the testator intended the legacies should remain part of the will.

*Bacon*, was not called on to reply.

The LORD CHANCELLOR, (LORD CRANWORTH.) I confess that I do not entertain any doubt on this case, though I say so with all deference, as the Vice-Chancellor and Master both agreed in taking a contrary view of it. The case of *Cooper v. Bockett*, 4 Moore's P. C. Cases, 419, established this principle, namely, that *prima facie* the presumption of law is, that alterations and erasures in a will are made after the execution; but that principle has no application to the present case, because the probate has been granted with the alterations on it. I may here remark, that I am not one of those who think that it is competent for this court on every occasion to look at the original will, though I am aware that Lord Eldon did it in some instances, but in each there were particular circumstances. I think it must be taken as conclusively settled by the Ecclesiastical Court, that the will was at its execution in the state in which we now find it; that is, that the testator executed the instrument with the cross lines drawn over it. That being so, the question is, what does the instrument mean. It has been suggested that the lines were on the paper before the testator wrote his will; but I must deal with that as if the matter was before me as a jury, and I cannot believe that the case is such as is suggested; it is an extravagant supposition. The meaning of the lines being drawn is, that what the testator had intended, as to giving the legacies over which they are drawn, had ceased to be his intention, and he therefore placed the lines there to show this; he meant to strike out the legacies. It is then said that there are pencil alterations of these legacies. If these were made before drawing the lines, they would be nothing, and if after, still, that would not satisfy me that the crossing out was not to have its natural effect; they do not erase the crossing out. I believe they were made before, but the circumstance makes no difference. The result is, that all the legacies were struck out, and that the exceptions taken to the Master's report and this appeal must be allowed.

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Tidd v. Lister; Bassill v. Lister.

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TIDD v. LISTER. BASSILL v. LISTER.<sup>1</sup>

January 11 and 16, and March 11, and April 29, 1854.

*Annuity — Assignment.*

An annuity duly charged on freeholds was by deed assigned, and by that deed a further security was given by the grantors upon copyholds, in consideration of an additional sum of money paid to the grantors, and the sum payable for redemption was increased in amount. The assignees of the annuity appeared in the memorial to be trustees for other persons, but the trust was not disclosed on the deed of assignment:—

*Held*, that the deed of assignment, so far as it affected the copyholds, and so far as it contained any alteration of the term on which the original annuity was granted, was void, but that it was valid as an assignment of the original annuity.

Bolton v. Williams, 2 Ves. jun. 138, observed upon.

AFTER the petition of appeal had been heard by the Lord Chancellor, but before his lordship had delivered his judgment, it was discovered, upon looking at the memorial of the annuity assigned by H. Blegborough to H. and J. Phillips, that they were not the grantees beneficially entitled to the annuity, but that they were trustees for Mr. and Mrs. Tipping, who were not parties to the deed of assignment; it was also ascertained, by reference to the deed of assignment, that the transaction in question was not a mere assignment, a further sum being fixed for the redemption of the annuity, and an additional sum having been received by Mr. and Mrs. Tidd. Soon after these facts were brought to the notice of Mrs. E. Tidd, a notice was left at the Lord Chancellor's, begging his lordship not to dispose of the case finally without permitting Mrs. E. Tidd to be heard on the invalidity of the security, so far as it affected the copyholds.

After the judgment was delivered, the Solicitor-General stated that there had been, as yet no proof by the Messrs. Phillips of the validity of their security against the copyholds; that the Vice-Chancellor's judgment, which had been just confirmed, rested on the assumption that the annuity was effectually charged on the copyholds, but that he had expressly stated if there was any question as to the validity of the security it must be verified by affidavit. See 10 Hare, p. 158; s. c. 17 Eng. Rep. 569. After some discussion, it was arranged that the case should stand over to enable the Messrs. Phillips to produce such evidence as would be sufficient to show that their security did include the copyholds.

For the purpose of understanding the point now to be raised, it will be necessary to state that, on the 6th May, 1822, an order was made in the suit of *Tidd v. Lister*, (which was an administration suit,) directing the receiver in that suit to pay the plaintiffs, Mr. and Mrs. Elizabeth Tidd, the surplus income of the estate of the testator, Josiah Lister, after providing for certain payments made by the will.

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<sup>1</sup> This is a continuation of the case reported in 23 Eng. Rep. 278.

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By an order dated 18th January, 1834, made in the same suit, after such previous payments, the receiver was ordered to pay to Henry Blegborough, out of the rents, profits, and dividends of the real and personal estate of the testator, an annuity of 127*l.* 10*s.*, which had, by deeds of lease and release, dated September, 1820, and by a fine conveying the life-interest of Elizabeth Tidd, in the freeholds, been duly secured to H. Blegborough, by Mr. and Mrs. Tidd. By an indenture bearing date 1st November, 1834, and indorsed on the indenture of September, 1820, and made between Henry Blegborough, Mr. and Mrs. Tidd, and Henry and James Phillips, the annuity of 127*l.* 10*s.*, with all securities for the same, was duly assigned to H. and J. Phillips, and the life-estate of Mrs. Elizabeth Tidd, in the copyholds of the testator, was conveyed and assured to a trustee for H. and J. Phillips for further securing the annuity. The deed recited that H. Blegborough had, in consideration of 1,000*l.*, agreed to assign the annuity of 127*l.* 10*s.*; and that Mr. and Mrs. Tidd had, in consideration of the further sum of 196*l.* to be paid to them by H. and J. Phillips, agreed to ratify and confirm the assignment. By an order dated 18th January, 1834, the receiver was directed to pay H. Blegborough his annuity out of the rents and profits of the estate; and, on the 1st November, 1834, an order was made directing payment of the annuity to Messrs. Phillips instead of to H. Blegborough. Some time afterwards, Mrs. Elizabeth Tidd's life-interest in the freehold estates of the testator was charged by deed and fine with the sum of 2,100*l.* in favor of Mrs. Mary Tidd. By an order in the same suit in March, 1834, the receiver was directed, after the payments previously directed, to pay the interest on that sum and the premiums on the policy on Elizabeth Tidd's life to Mary Bassill, who afterwards became entitled to this security, and a similar order was made in her favor.

On the 16th January, 1854, the question came on to be argued solely with reference to the invalidity of the deed of the 1st November 1834, so far as it affected to charge Mrs. Elizabeth Tidd's life-interest in the copyholds.

The *Solicitor-General* and *Leach*, for Mrs. Elizabeth Tidd.

The annuity deed under which Messrs. Phillips claim is invalid, not being in conformity with the 4th section of the Annuity Act, 53 Geo. 3, c. 141, which enacts: "That in every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall from and after the passing of this act be granted or attempted to be granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, where the person or persons to whom such annuity shall be granted or secured to be paid, shall not be entitled thereto beneficially, the name or names of the person or persons who is or are intended to take the annuity beneficially shall be described in such or the like manner as is hereinbefore required in the enrolment, otherwise every such deed, instrument, or other assurance shall be null and void." The difference between this act and the former Annuity Act, 17 Geo. 3, c. 26, was this, that

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whereas the old act only applied to grants of annuities, the subsequent act introduces the words "secured to be paid," which will clearly involve the necessity of enrolling such a security as this, which ratifies and confirms the annuity to a different person and upon different terms of redemption. It is enough for us to show that the beneficial owners of the annuity are not the same persons as appear on the face of the deed to be the owners. The deed of assignment in the present case does not correctly state the facts of the real annuity granted; it professes to be granted to persons to whom in truth it was not granted. *Hood v. Burlton*, 2 Ves. jun. 29; *Denn v. Dolman*, 5 T. R. 641; *Hoffman v. Cooke*, 5 Ves. 623. It will be contended that in fact the second annuity was not a new annuity, but a mere assignment of a previously existing annuity; but granting that a mere assignment of annuity by the annuitant need not be enrolled, yet, where the grantor is a party, and the assurance is as it were confirmed, such a transaction must be enrolled. *Duke of Bolton v. Williams*, 2 Ves. jun. 138; s. c. 4 Bro. C. C. 297. With reference to the necessity of enrolment in such a case, Lord Commissioner Eyre, in the case of *Hood v. Burlton*, 2 Ves. jun. 29, see p. 34, observes: "It is manifestly the object of the act to comprehend all manner of instruments calculated to secure the payment of an annuity. Though the language is, 'whereby an annuity shall be granted,' yet the construction ought to be, whereby it shall be in any manner secured to be paid; and therefore if the court thinks this an instrument whereby an annuity is secured to be paid, however it has been granted, all those instruments must be within the act, or there is an end of it." On this principle, a bond given by a third person to secure an annuity must be registered. *Rosher v. Hurdis*, 5 T. R. 678. In *Earle v. Browne*, 10 A. & E. 412, see p. 416, Mr. Justice Littledale observed: "The alteration of an annuity requires enrolment just as much as the original grant;" in that case, the substituted annuity was of less amount than the original one, and the grantor covenanted that in consideration of the grantee's acceptance of the reduced annuity not to redeem for five years, and it was provided that the securities for the former annuity should be securities for the new one. The order of November, 1834, relied on by Messrs. Phillips, was obtained on a misrepresentation as to the identity of the annuity, and the order was void so far as Mrs. Tidd was concerned, having been obtained in the lifetime of her husband, nor is she liable in respect of any advances by the annuitant. *Angell v. Hadden*, 2 Mer. 169; *Jones v. Harris*, 9 Ves. 486; *Frank v. Frank*, 3 Myl. & Cr. 171. Under these circumstances no binding order can be made as against the copyholds, nor indeed will this court sanction any order against the freeholds, though as the petition by a slip has admitted that the freeholds are rightly charged, it may not be competent for the petitioner to complain as to them. It is submitted, however, that the fund, being in possession of the receiver of the court, will not be parted with except to the rightful owner; and, the transaction being void, no confirmation can make it valid. *Bromley v. Holland*, Cooper, 9; s. c. 5 Ves. 610; 7 Ves. 3. Nor is it, under

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such circumstances, necessary to file a bill to set it aside. *Ex parte Shaw*, 5 Ves. 620. They also referred to *Gorton v. Champneys*, 1 Bing. 287.

*Rolt and Eddis*, for Mrs. Bassill, submitted that the objection as to the validity of the annuity was equally applicable to the freehold as to the copyhold property, and that the deed must be declared entirely void. They referred to *Hammond v. Foster*, 5 T. R. 635, and *Humphreys v. Jenkinson*, 8 Exch. Rep. 684; s. c. 20 Eng. Rep. 477.

*Walker and Hardy*, for Messrs. Phillips.

So far from Mrs. Tidd not being concluded by the order of 1834, she has not only not repudiated it, but has adopted and confirmed it, by admitting its validity as to the freeholds; she cannot therefore be permitted to assert its invalidity in any way. *Roberts v. Madocks* 13 Sim. 549. The judgment of this court being pronounced, the order ought to be drawn up without imposing any terms upon us to show that the annuity was duly enrolled; it is not for us to invalidate our own title, but for the party impugning the transaction to prove the defect if it exists. *Doe v. Bingham*, 4 B. & A. 672. And such defect being neither alleged nor alluded to in the pleadings no advantage can now be taken of it in this form of proceeding. *Dunn v. Calcraft*, 2 S. & S. 56. The deed of November, 1834, alone can be looked at to see the effect of the transaction; it was clearly an assignment and not a new grant of an annuity within the meaning of the act, which was directed to the protection of grants only of annuities, and being an assignment merely it did not require enrolment. *Bromley v. Greathead*,<sup>1</sup> *Dixon v. Birch*, 2 H. Black. 307; *Browne v. Like*, 14 Ves. 302; *Nield v. Smith*, 14 Ves. 491. But assuming, for a moment, that the transaction amounted to a grant of a new annuity requiring enrolment, and that the enrolment was defective as to the copyholds; nevertheless, the grantees will be remitted to the position of their assignor under the deed of 1820, and *quoad* the freeholds, the annuity will be valid and subsisting, *Browne v. Rose*, 6 Taunt. 124; see p. in which case Gibbs, C. J., says: "Though it was held in the case of *The Duke of Bolton v. Williams* that a defect in one of the instruments affected all, we cannot think that such was the intent of the legislature. We think it was only meant that the want of prescribed observances should vitiate the particular security." By the deed of assignment, Mrs. Tidd is bound as to her reversionary interest, nor can extrinsic circumstances be permitted to affect or control the legal import of the instrument. *Irnham v. Child*, 1 Bro. C. C. 92; *Squire v. Campbell*, 1 Myl. & Cr. 459; *Marriage v. Marriage*, 1 C. B. Rep. 761. The annuity assigned is precisely the same as that originally granted, the only difference is that there is an increased amount payable for redemption, but that would not render enrolment necessary. *Booth v. Druce*, 4 Taunt. 252. Nor would the fact that the copy-

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<sup>1</sup> Cited from MSS. in Hunt on the Annuity Act, p. 45.

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deed of 1834 is void, because the names of the persons beneficially interested are not disclosed on the face of the instrument.

Such being the view taken by Mrs. Tidd, she asks, among other things, that the rents of the copyhold property may be ordered to be paid to her, and in substance, that these rents may be withdrawn from all claimants except herself; that she, having succeeded as tenant for life of the copyhold property, it may be treated as property in which she alone has an interest. I think, for the reasons I have stated, that that is the right view of the case, and that she is so entitled.

But, then, there is raised another question on which I have had some doubt. Mrs. Bassill says, although that is all Mrs. Tidd asks, yet if such relief is given to Mrs. Tidd, something more must be provided for, because she, (Mrs. Bassill,) has an interest in contending that the whole deed is void, and that Messrs. Phillips have no security at all for their annuity; so that her annuity comes in as the first instead of the second incumbrance on the freehold property. I have turned this a good deal in my mind, but I cannot concur in that view of the case. When it is said that the deed of assignment is void under the statute, I think that that must be taken with a qualification. It was formerly thought, and particularly by Lord Loughborough, (who, if one may venture so to speak of such a high authority, seems to me sometimes to have been running wild in his zeal to set aside annuities,) that every transfer of an annuity required to be memorialized. He says so in terms, and he so decided in the case of *Duke of Bolton v. Williams*, 2 Ves. jun. 138, which was not exactly but nearly the same case as the present; in that case, he distinctly gave as the reason why the new annuitant (who had taken an assignment of two annuities, and some new terms being also introduced as to the redemption) could not set up the assignment from the two former annuitants, that every assignment of an annuity required to be memorialized as well as the original grant, because he said, "it must appear by the registry, who is the real owner, and beneficially entitled to the annuity." The statute, however, has said nothing of the sort; and it is quite clear that his lordship's view is incorrect. In the subsequent case of *Dixon v. Birch*, 2 H. Black. 307; in the Common Pleas, before the Lord Chief Justice Eyre, followed by *Bromley v. Greathead*, in the Exchequer, before Lord Kenyon, mentioned in a note to *Dixon v. Birch*, both those learned judges held that Lord Loughborough's was an erroneous view, and that the statute did not say that a person who had an annuity properly granted could not legally assign it without its being memorialized. That doctrine, so laid down by both courts, has, I believe, been understood and acted upon ever since.

It is possible that Lord Loughborough's decision in the case of *Duke of Bolton v. Williams* may be sound, notwithstanding the subsequent decisions in *Dixon v. Birch* and *Bromley v. Greathead*, to the effect that the mere assignment of an annuity does not require to be memorialized; for in the case of *Duke of Bolton v. Williams*, it was not simply the assignment of an annuity, but it was the assignment

of two separate annuities, so as to merge them together, making them one new annuity of the same amount. I do not say I should have thought this a very reasonable distinction, but it may constitute a distinction. If it does not, I can only say I see nothing in the statute requiring the assignment of an annuity to be memorialized, and the two cases to which I have just referred clearly support my conclusion. Now, if that be the correct view of the case, what is the effect of the statute in saying, with reference to the particular deed in question, that that deed should be void? In the present case, the original annuitant, Dr. Blegborough, having a perfectly valid annuity of 127*l.* 10*s.* for the life of Mrs. Tidd, in consideration of 1,000*l.* paid to him by the Messrs. Phillips, assigned that annuity to them. Suppose that this had been done by a separate deed, I have not the least doubt that it would have been a perfectly valid deed, and that the Messrs. Phillips would have had it independently of the annuity act. No memorial, then, being necessary, the circumstance that they were trustees is immaterial, because the same principle which shows that the memorial is not necessary also shows that the 4th section of the act 53 Geo. III., c. 141, does not apply. The assignment would have been valid whether it stated Messrs. Phillips as trustees or not; it was, like any other assignment, unaffected by the Annuity Act. What further took place was this: the Messrs. Phillips, finding the security a beneficial one, agreed to give Mr. and Mrs. Tidd nearly 200*l.* more upon the occasion of the assignment; and Mr. and Mrs. Tidd agreed that the annuity should not be redeemable except on payment of the additional sum. I have already stated that I think the alteration of the sums payable for redemption constituted it a new transaction. But suppose that the transaction had been effected by two deeds instead of one, there is no doubt that the agreement to alter the terms of redemption would not have invalidated the former annuity, which would have remained untouched. I know that doctrine was disputed in the argument on the authority of *Earle v. Browne*, 10 A. & E. 412. That case I must say is not to my mind entirely satisfactory, because, as I understand it, the court there went further in setting aside the deeds than they were authorized to do, even supposing their decision as to the transaction to have been right. This it may have been; but I do not think that it at all necessarily governs the present case. In that case, there was not only a change in the terms of the redemption of the annuity, but the original annuity was destroyed, and a new annuity was substituted for it; the original annuity was an annuity of 180*l.* a year, redeemable at a certain time; the annuity was altered from 180*l.* a year to a smaller annuity, and the terms of redemption were also altered, and the Court of Queen's Bench came to the conclusion that to hold that not to be a new transaction would be to enable a person to defeat the Annuity Act altogether; and treating it as a new annuity they decided that the consequences of its not being properly enrolled must therefore attach. That is not the case here; because in this case, although the transaction in question was effected by the same deed, it was in truth merely an assignment by Dr.

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securing the regular payment of the interest of all the said principal moneys secured, as thereinbefore recited, it had been agreed between Richard Gutteridge, Sarah Frances Rice, and Edward Rice, that the premises should be vested in James Heenan for the term of twenty-one years, upon the trusts thereafter declared of the same; and that James Heenan, his executors, administrators, and assigns, should be invested with such power and authorities as were thereafter expressed, as receiver and receivers of the rents and profits of the said premises; and after further reciting that a license had been obtained from the lord of the manor empowering Sarah Frances Rice and Richard Gutteridge to demise the premises in manner and for the term thereafter mentioned, it was witnessed that Sarah Frances Rice, with the privity and approbation of Richard Gutteridge and Edward Rice, demised the premises unto James Heenan, his executors, administrators, and assigns, for the term of twenty-one years, commencing from the 24th of June, 1840, without impeachment of waste, upon trust, that James Heenan, his executors, administrators, and assigns, should from time to time thereafter, at the request and by the direction of Sarah F. Rice, her executors, administrators, and assigns, during the continuance of the said several securities then vested in her as thereinbefore stated, or any of them, and after full satisfaction and discharge of the same several securities, then at the request and by the direction of Edward Rice, his executors, administrators, or assigns, during the continuance of the security then vested in him as thereinbefore stated, and after the full discharge and satisfaction of all the said several securities, then at the request and by the direction of Richard Gutteridge, his heirs or assigns, demise and lease to the persons or person for the time being, entitled under the said several agreements thereinbefore mentioned, or any of them, or to any other person or persons whomsoever, any part or parts of the said premises for all, or any part of the then unexpired residue of the term of twenty-one years, upon such terms and in such manner as the person or persons making such requests and giving such directions as aforesaid should respectively appoint, and upon further trust that until default should be made in payment to Sarah F. Rice, her executors, administrators, or assigns of the interest to become due upon the several mortgage debts therein mentioned, James Heenan, his executors, administrators, and assigns should permit Richard Gutteridge, his heirs and assigns to receive and take the rents and profits of the said premises for his and their own benefit; and upon further trust, that in case any such default in payment should be so made, then, and in any such case, James Heenan, his executors, administrators, and assigns, should thenceforth, from time to time, during the continuance of the said several securities, or any of them, collect and receive all and singular, the rents and profits of the said premises from the then present and future lessees, tenants, and occupiers of the said premises, and other the person or persons who should be liable to pay the rents and profits thereof respectively, when and as the same respectively should become due. The deed then purported to empower the defendant to collect the rents and do all such acts as the mort-

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gagor and mortgagees could have done. And it declared that the defendant, his executors, administrators, and assigns, should stand possessed of the rents and profits which should be collected, or received by him, or them respectively, upon trust from time to time, in the first place, to pay thereout all taxes, rates, assessments, and impositions which then were, or should thereafter be payable in respect of the same premises, and which the respective lessees, tenants, or occupiers thereof should not be liable to pay, and in the next place, to deduct and retain thereout for his and their own benefit a reasonable compensation for his and their trouble and expense in collecting, and recovering, receiving, and applying the said rents and profits respectively, not exceeding one shilling in the pound upon all moneys to be so collected and received; and in the next place, to pay thereout to Sarah F. Rice, her executors, administrators, or assigns, the interest to become due on her mortgage debt; and in the next place, to pay thereout to Edward Rice, his executors, administrators, or assigns, the interest to become due on his debts; and in the last place to pay all the residue or surplus (if any) of the said rents and profits after answering and satisfying the trusts and purposes aforesaid to Richard Gutteridge, his executors, administrators, or assigns.

In the year 1843, default having been made in payment to Sarah F. Rice of the interest on her several securities, the defendant, under the powers and authorities given to him as aforesaid, entered into and had ever since been in receipt of the rents and profits of the said premises.

Sarah F. Rice had died, and Henry Edridge Rice, her nephew and heir at law and customary heir, had been admitted.

Sales had been made under the trust contained in the mortgage, and all the purchasers (except one) had accepted the title to their several lots purchased by them, and were willing to complete their purchases, provided the defendant would, upon completion thereof, surrender, or assign to them, or as they might direct, their several lots for all the residue of the term vested in him. Requests had been made to him by the plaintiff, (who was the executor of Mrs. Sarah F. Rice,) to make such surrenders or assignments accordingly, but the defendant refused so to do without either the direction of the court, or the concurrence of the several persons interested in the equity of redemption, on the ground that he had been advised by counsel that it was very doubtful whether the effect of the indenture of the 20th of August, 1841, was not to destroy, or at all events to suspend, during the term thereby created, the power of sale given to Sarah F. Rice by the indenture of the 30th of April, 1841.

The questions for the opinion of the court were:—

Whether the power of sale given to or vested in Sarah F. Rice, by the indenture of the 30th of April, 1841, was or not destroyed or suspended by the indenture of the 20th of August, 1841.

And whether the defendant was bound, without the concurrence of any of the persons interested in the equity of redemption of the premises bought by the said purchasers respectively, to assign or dispose of the same respectively for all the residue of the term of years

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in such manner as they respectively, on the completion of their respective purchases, might require.

*Malins* and *Surrage*, for the plaintiff, were not required to address the court.

*Chandless* and *Goodeve*, for the defendant, contended that the deed of the 20th of August, 1841, was not merely an appointment of a receiver on behalf of a mortgagor and mortgagee, but was made for the purpose of carrying into effect a general scheme of letting which could not be determined without the assent of the mortgagor. There was nothing in the deed determining those trusts at the will of either of the parties alone. If it had been intended to preserve the power of sale, some words expressing such an intention would have been introduced. At all events, Mr. Heenan could not safely act upon a mere private opinion.

Their lordships held that the power of sale was not affected by the provisions of the deed of the 20th of August, 1841, and that the defendant was bound to concur in the assurance to the purchasers.

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March 19, 1853.

*Evidence in Inquiry under Decree — Books of Account.*

The meaning of the act 15 & 16 Vict. c. 86, s. 54, is, that where vouchers have been lost, or the accounts cannot be taken in the ordinary way, the court may give special directions. But such directions will not be given unless it appears that the ordinary evidence cannot be had, or merely to save expense.

*Semble*, that by the ordinary rules of the court, partnership books are admissible in evidence for and against all the partners and their estates.

*Semble*, that the 15 & 16 Vict. c. 86, s. 54, does not operate retrospectively.

THIS was an appeal of defendants from the refusal, by Vice-Chancellor Stuart, of motion, that in taking the accounts directed by the decree on July 23, 1851, of the dealings and transactions between Adam Lodge, the testator in the pleadings named, and the defendants Richard Williams Prichard and William Rushton Coulborn, and in making the inquiries as to what the partnership consisted of at the time of the death of the testator, and what was the share and interest of the testator therein, the several partnership books of account, in which the accounts of the said dealings and transactions had been kept (namely, the "cash book," "waste book," and "ledger," used in keeping the partnership accounts between the testator and the defendants, Richard Williams Prichard and William Rushton Coul-

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born) might be taken as *prima facie* evidence of the truth of the matters therein contained.

In support of the motion, the defendant, William Rushton Coulborn, deposed that for several years prior to the 1st of January, 1837, the testator had carried on business in Liverpool as a ship-owner and general merchant in partnership with the defendant, R. W. Prichard, and the deponent; but that during such period the testator was interested in the ships only as a part-owner thereof, and had no interest in the general business; that in the month of January, 1837, it was arranged that the deponent should also be admitted as a partner in the general business from the 1st of January, 1837; that the last-mentioned partnership was determined by the death of the testator on the 5th of April, 1847; that within a month after the death of the testator and at an interview which the deponent had with the plaintiff and John Lodge Ellerton, one of the defendants, respecting the testator's affairs, the deponent suggested to them that it would be satisfactory to Richard Williams Prichard and himself if the plaintiff and Mr. Ellerton would employ an accountant to examine the books of the partnership and investigate the testator's affairs on their behalf; and that accordingly they appointed, for that purpose, an accountant named Banner, who instituted a laborious investigation of the copartnership affairs on behalf of the plaintiff and Mr. Ellerton, and that some closing entries were made in such books by his direction or with his full sanction and approval for the purpose of ascertaining the profits, if any, and making a division thereof, and otherwise adjusting such partnership accounts, and that the same were so adjusted and settled by him up to the 5th of April, 1837; that no entry was made in the partnership books subsequently to the death of the testator, except by the direction or with the full sanction and approval of Mr. Banner, and that no such entry was made except for the purpose of properly stating, adjusting, and settling the partnership accounts; that the cash book, waste book, and ledger, used by the partnership in keeping the partnership accounts, were severally produced to and identified by him (the deponent) at the time when he made an affidavit in the cause, filed 11th January, 1853; that the entries appearing in the said partnership books, except the entries made as aforesaid by and with the direction or sanction of Mr. Banner, were severally made from time to time in a due course of business.

James and Selwyn supported the motion, which was opposed by the plaintiff, in person.

The Act 15 & 16 Vict. c. 86, s. 54,<sup>1</sup> was referred to and relied upon.

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<sup>1</sup> 15 & 16 Vict. c. 86, s. 54: "It shall be lawful for the court in any case where any account is required to be taken to give such special directions, if any, as it may think fit, with respect to the mode in which the account should be taken or vouched, and such special directions may be given either by the decree or order directing such account, or by any subsequent order or orders, upon its appearing to the court that the circumstances of the case are such as to require such special directions, and particu-

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TURNER, L. J. According to the view which we take of this case, it is not necessary for us to make any order. I take the meaning of the act of parliament to be that, where vouchers have been lost or accounts cannot be taken in the ordinary course, the court may give directions as to the mode in which the accounts shall be taken, and as to the evidence which may be adduced in support of the items; and in truth, according to my recollection, the clause referred to only established a practice which had been already adopted. (His lordship referred to *Brown v. De Tastet*, Jac. 284.) The court always used to exercise this power, but if, upon a cause coming on for further directions, it appeared that justice had not been done in the Master's office, the case was sent back to the Master, with special directions. Here there is no *constat* that the ordinary evidence cannot be had. It may be expensive, but I am not prepared to say that this court can exercise the power of dispensing with the ordinary evidence for the mere purpose of saving expense. — (His lordship read the section of the act.) — I think that the court is bound to see whether the matter requires special directions to be given before it gives any such directions. This does not appear to me to be a case coming within the meaning of the act. I am aware that some doubt has been felt in the Master's offices whether entries in partnership books are evidence against all the parties, but I am not aware that any such doubt has been expressed by the court. If the point should be brought before the court, it would be by way of exception, and it would then be decided, and if necessary proper directions would be given. I also doubt whether the act can operate retrospectively.

KNIGHT BRUCE, L. J. There are two points, on each of which I entertain too much doubt to dissent from the order before us. 1. Whether the 54th section of the act of parliament applies to an account directed to be taken by a decree made before the act passed; 2. Whether the only order which could have been made would not have been one to the effect that the books should be taken as *primâ facie* evidence.

Why are they not so now? They contain accounts of the dealings and transactions of a partnership, and an account of these dealings is sought at the instance of a person beneficially interested in the estate of one of the partners against his surviving partners. That question only relates to what took place in the lifetime of the deceased partner. *Primâ facie*, the books of the partnership are evidence among all the partners, for them all and against them all, owing to the agency which pervaded all the partnership transactions. If one partner succeeded in establishing a case of fraud, that would form a ground for an ex-

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larly it shall be lawful for the court, in cases where it shall think fit so to do, to direct that in taking the accounts the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."

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ception from the general rule, nor is there anything in the rule to exclude an allegation of a mistaken or erroneous omission or insertion. The only question is, whether the books are *prima facie* evidence between the partners and their estates. In my opinion, they are; and therefore the only order which could reasonably be made, would not give the appellants more than the law already gives them.

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JONES v. ROBINSON.

March 8, 1854.

*Partition Suit—Form of Decree—Deeds.*

The plaintiff in a partition suit was entitled to six sevenths of the estate, and had the title-deeds:—

*Held*, that the proper form of decree, as to the documents of title, was for the delivery to the defendant of such of them as related exclusively to the land which should be allotted to him, and for the retainer by the plaintiff of the rest, he undertaking to abide by any order which the court might make as to the same, with liberty for either party to apply.

THIS was an appeal from the decision of the Master of the Rolls upon a claim for partition, and the question was as to the form of the decree with respect to the custody of the documents of title. The plaintiff and one of the defendants were tenants in common of the property, the plaintiff being entitled to six seventh parts, and the defendant to the remaining one seventh.

The deeds and writings were in the possession of the plaintiff.

*Giffard*, for the plaintiff, contended that the plaintiff was entitled to retain all the deeds except such as related exclusively to the distinct parts of the property, which should be allotted to the defendant. He referred to *Hand's Practice*, p. 152, and the form <sup>1</sup> of order upon a purchase under a decree there set out as settled by Lord Hardwicke.

*Karslake*, for the defendant, entitled to the other one seventh.

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<sup>1</sup> August 8, 1794. "And it is ordered, that such of the title-deeds, evidences, and writings as relate solely to the estate purchased by the said J. H., and also such as relate to the same jointly with other estates of less value, be delivered to the said J. H., or to whom he shall appoint, he submitting to produce such last-mentioned deeds and writings on necessary occasions, and to enter into a covenant for that purpose, and to give attested copies thereof when required at the expense of the party requiring the same; but as to such of the title-deeds as relate to the estate purchased by the said J. H. jointly with other estates of greater value, he is to have attested copies thereof at the expense of the estate, and the persons entitled to such estates of greater value are to execute to him the like covenants to produce such deeds and writings on necessary occasions, and in case any dispute shall arise between the parties touching the copies of any particular deeds relating to the title, the said Master is to settle the same."

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An order on a purchase under the decree of the court differs entirely from a decree in a partition suit. The proper form of decree in the latter case, is to direct the deposit of the deeds relating to all the property in the Master's office, (Seton on Decrees, 187,) *Trodd v. Downes*, Seton on Decrees, 188; 2 Atk. 304. One tenant in common has no more right to the deeds than the other.

[KNIGHT BRUCE, L. J. But what right has the other to take them from him if he has the possession?]

*Bazalgette* appeared for another defendant.

KNIGHT BRUCE, L. J. I am not aware of any rule of practice or convenience which requires in the absence of any special circumstance the deposit in the Master's office, or the record office of deeds, relating to property allotted to more persons than one. There appears to be no general rule to that effect. The general rule seems to be to frame the decree as in *Lord Cardigan's Case*, Seton on Decrees, 185, and to reserve liberty to apply as to such documents; and the proper course, as it appears to me, is to leave the deeds where they are, with liberty to apply; the plaintiff undertaking to abide by any order which the court may make.

TURNER, L. J. The right to partition is a legal right, and I see no sufficient reason for giving the direction now sought.

The following was the form of the order:—

It is ordered that the defendant, Roger Farrand Jackson, do convey the legal estate vested in him, of and in the one seventh of the legal estate in the hereditaments and premises in the plaintiff's claim and affidavit mentioned, to the plaintiff, his heirs and assigns, such conveyance to be settled by the Master of this court in rotation, in case the parties differ about the same. And it is ordered that a commission of partition do issue, directed to certain commissioners to be therein named, to divide the said hereditaments and premises in question into seven equal parts, and to make such partition in metes and bounds when they shall see occasion. And it is ordered that six sevenths thereof be allotted as the share of the plaintiff, and one seventh as the share of the defendant, Robert Robinson, who are to hold and enjoy the respective shares and proportions of the said estates in severalty, according to such allotment, and execute mutual conveyances of such respective shares or proportions according to their respective interests therein, and as they may respectively direct, such conveyance to be settled by the Master of this court in rotation, in case the parties differ about the same. And it is ordered that the said Robert Robinson be appointed to convey the said hereditaments in the place and stead of Robert H. Wilson, in the claim mentioned. And it is ordered that he do convey the same in his place and stead, and execute in his place and stead such deed or deeds as is or are necessary for that purpose. And it is ordered that all deeds and writings in the custody or power of any of the parties be produced before the commissioners on oath as they shall require, and the said

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commissioners are to be at liberty to examine witnesses upon oath, and take the depositions in writing, and return the same with the commissioners' report, and after making such partition and division, it is ordered that such of the title-deeds and writings as shall appear to relate solely to any distinct part of the said hereditaments and premises which shall be allotted to either party be delivered to such party. And it is ordered that the plaintiff be at liberty to retain the rest of such title-deeds and writings, he undertaking to abide by any order which this court may make as to the same, and either party is to be at liberty to apply to this court for directions concerning the same. And it is ordered that the charges of such partition be borne ratably and in proportion to the estates so to be allotted to them, and any of the parties are to be at liberty to apply to this court, as advised.

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KIDD v. NORTH.

March 15, and April 21, 1853.

*Will—Construction.*

A testator gave his residuary estate upon trust to pay to A an annuity during her life, and to accumulate the surplus income till the expiration of six months after A's death, and then to divide the residue and accumulations into as many shares as there should be children "living" of A and of B, who should have lived to attain twenty-one, or, in case of any of them being dead under that age, who should have left issue, and pay and apply one share to each of the children of A and B, that should have lived to attain twenty-one, and to their respective executors, administrators, and assigns, and one share to the issue of each child who should have died under that age, leaving lawful issue:—

*Held*, that the word "living" was not referable to the period of distribution, but to that of the testator's death; so that each child, on attaining twenty-one, took a vested interest absolutely.

THIS case came on by order to be heard originally before their lordships on further directions, with a petition, and the question turned upon the construction of the will of John Kidd, dated the 19th of July, 1830, whereby he declared the trusts of his residuary estates as follows:—

"Upon trust by and out of the yearly interest dividends and annual produce to arise therefrom to pay unto Elizabeth Kidd of Prescott, widow of my late relative William Kidd of Prescott aforesaid, surgeon, one annuity or clear yearly sum of 100*l.* for and during the term of her natural life, by two equal half yearly payments in each year, the first payment thereof to commence and be made to her at the end of six calendar months next after my decease, whether my real, copyhold, and leasehold estates shall have been then sold or not; and upon further trust by and out of the yearly dividends and annual produce to arise as aforesaid from the rents and interest of my said real, leasehold, and personal estate, to pay unto Mary, otherwise Maria Kidd, widow of my late relative Thomas Kidd, of Liverpool, aforesaid,

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one annuity or clear yearly sum of 50*l*. for and during the term of her natural life, by two equal half yearly payments in each year, the first payment thereof to commence and be made to her at the end of six calendar months next after my decease, whether my said real, copyhold, and leasehold estates shall have been then sold or not; and upon further trust, after paying the several yearly sums aforesaid, to put and place out at interest, as aforesaid, any surplus that shall remain of the interest, dividends, and annual proceeds, in order to accumulate; and from and after the expiration of six calendar months from the death and decease of the said Elizabeth Kidd, upon trust to pay to such of her children as shall then have attained the respective ages of twenty-one years the sum of 500*l*. each, and to retain the like sum of 500*l*. for each and every of her children who shall not then have attained that age, and to place out the same upon the like securities as aforesaid, until their respective attainments thereto, and then to pay the same to him or her respectively; and from and after the death and decease of the said Mary, otherwise Maria Kidd, upon trust to pay each of the children of Thomas Kidd and Elizabeth the sum of 500*l*. within six calendar months next after her decease; and upon the youngest child of the said Elizabeth Kidd of Prescott, attaining the said age of twenty-one years, or in case of its death prior to that age, then the next youngest child attaining the said age of twenty-one years, and so on upwards with respect to her children, it being my intention that the division hereinafter mentioned is to take place when the last youngest child of the said Elizabeth Kidd shall have attained that age, provided the said Elizabeth Kidd shall be then dead, but not otherwise, it being my intention that the division shall not be made until six calendar months next after the decease of the said Elizabeth Kidd, upon trust to divide the then residue and accumulations into as many shares as there shall be children living of the said Elizabeth Kidd and Mary, otherwise Maria Kidd, that shall have lived to attain that age, or in case any of them being dead under that age shall have left behind him or her lawful issue, and pay and apply one such equal share thereof to each of the children of the said Elizabeth Kidd and Mary, otherwise Maria Kidd, that shall have lived to attain that age, and to their respective executors, administrators, and assigns, and one other such equal share thereof unto the issue of each such child that shall have died under that age leaving lawful issue."

The testator died on the 4th of March, 1835, and the will and three codicils not affecting the above trusts were duly proved by John North and Ambrose Lace, the executors.<sup>1</sup>

Maria Kidd died in the lifetime of the testator, on the 13th of July, 1834, having had two children only, who were living at the death of the testator, namely, Thomas Kidd, since deceased, and Elizabeth Kidd. Elizabeth Kidd was still living, and had had five children, namely, James Kidd and William Turner Kidd, both since deceased,

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<sup>1</sup> The case is reported on other points in 14 Sim. 463, and 2 Phl. 91.

and Edward Taylor Kidd, Anne Atherton, and Alice Beal, all of whom were living at the death of the testator John Kidd, and had respectively attained the age of twenty-one years.

The question was, whether the children took vested interests before the death of Elizabeth Kidd.

*Rolt and Jolliffe*, were for the plaintiffs.

*Follett, James, Giffard, and Eddis*, for the defendants.

*Judgment reserved.*

April 21. KNIGHT BRUCE, L. J. In this case, as I understand the facts, all the children of Elizabeth Kidd, the annuitant of 100*l.* per annum, who were living when the testator made his will, were by that husband who is mentioned in it, are still living, and have attained majority; and all the children of Mary, otherwise Maria Kidd, the annuitant of 50*l.* per annum, who were living when the will was made, were by that husband who is mentioned in it, are also living, and have attained majority, except one of the children who, as I believe, died after the testator's death, having, however, attained majority. The question is, whether if any of them shall die in the lifetime of Elizabeth Kidd, the annuitant of 100*l.* per annum, the share of the child so dying will devolve on the children who shall survive that lady. In my opinion the true view of the case requires that question to be answered in the negative. It seems to me that the shares of the children of each family are absolutely vested.

The word "living," used in the residuary gift, means, I think, "now living;" that is, the testator intended, in my opinion, to benefit not any child that Elizabeth Kidd, the annuitant of 100*l.* per annum, might have after the will, but such children only of that lady as were children of her deceased husband, the testator's relative, William Kidd, of Prescott; (though of the names, ages, and number of those children, the testator was probably uncertain;) and to benefit not any child that Mary, otherwise Maria Kidd, the annuitant of 50*l.* per annum, might have after the will, but such children only of that lady as were of her deceased husband, the testator's relative, Thomas Kidd, of Liverpool. Nor can the testator be supposed to have intended that the share of a child, dying after majority, leaving issue, should be lost to that child and his issue in favor of other children, when that was not to be the case with the share of a child dying in minority leaving issue.

The rules of grammar and idiom seem also to require that "living" should be understood as "now living," for the will says: "Children living of the said Elizabeth Kidd and Mary, otherwise Maria Kidd, that shall have lived to attain that age, or in case any of them being dead under that age, shall have left behind him, or her, lawful issue." The description of "living" being expressly ascribed to a child not living, unless the word "living" be read as meaning, "now alive."

The testator might, perhaps, have expressed himself more neatly

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Kidd v. North.

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and clearly. But I am satisfied that we are fulfilling his intention by holding the vesting of all the shares (including that of the dead child) to have taken place (in the events that have happened) finally and absolutely.

TURNER, L. J. This is a question of some difficulty upon the construction of a will. John Kidd, the testator, by his will, after directing the conversion of his real and personal estate into money, and the investment of the proceeds by his trustees on government or real securities, has declared the following trusts. [His lordship read them.]

The question is, whether any shares of the residue were vested in the children of Elizabeth and Mary, otherwise Maria Kidd, who attained twenty-one, and afterwards died in the lifetime of Elizabeth, or whether the interests of the children of Elizabeth and Mary, who attained twenty-one, were contingent on their surviving Elizabeth. I am of opinion that the children of Elizabeth and Mary, who attained twenty-one, and afterwards died in Elizabeth's lifetime, took vested interests.

The question seems to me to depend mainly upon the effect to be attributed to the word "living," in the direction to divide the residue into as many shares as there should be children living of Elizabeth and Mary. If the word "then" had occurred in this clause, and the direction had been to divide into as many shares as there should be children, "then living," of Elizabeth and Mary, the terms of contingency in this, the leading direction of the will, would have been so clear and positive that the court could hardly, I think, have been warranted in departing from them, or construing the disposition otherwise than as throughout importing contingency. But the word "then" is not found in this clause in connection with the word "living," and the question, therefore, is more open upon the context, whether the word "living" was intended by this testator to import contingency. Looking at the context of this will, I do not think that it was.

This testator, in the commencement of the disposition of his residue, had been referring to the successive youngest children of Elizabeth, dying under twenty-one. And, I think that he has used the term, "children living," on which the question of contingency arises, in contradistinction merely to the children so dying, and that the word living is merely expletive. There are several reasons which have led me to this conclusion. 1. There is the absence of the word "then," in connection with the word "living." This testator has shown by other parts of his will, that he knew the use of the word "then." He has used it in the gift of the legacies of 500*l.* to the children of Elizabeth, who should then have attained twenty-one; and again, in this very clause, provided Elizabeth shall be then dead; and yet he does not attach it to the word living in this the most material part of his disposition. 2. The word "living" is introduced only in the direction to divide, and not in the direction to pay, which is absolute and unqualified, the direction being to pay to the

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children who shall live to attain twenty-one. It would be inconsistent to construe the latter direction as absolute, and the former as importing contingency. It is true that this inconsistency would be equally well removed by reading the words "who shall live" to mean "who shall have lived," but the court would, of course, lean to the construction which favors the vesting rather than to that which imports contingency. 3. The direction is to pay to the children who shall live to attain twenty-one, "their executors, administrators, and assigns;" and, although these superadded words might, in the event of Elizabeth surviving the period when her youngest child should attain twenty-one, (an event which the testator has in terms referred to as possible, and which must, therefore, be so treated by the court,) be well accounted for by the period of six months, which in that event was to elapse before the division, I see nothing which, upon the supposition of the disposition being contingent, can account for these superadded words, in the event of Elizabeth's predeceasing the period of her youngest child attaining twenty-one. And lastly, the disposition is in favor of a class to be composed of children attaining twenty-one, and of the issue of children dying under twenty-one. According to the terms of the disposition, the issue of the children would, as I apprehend, take vested interests upon the deaths of their parents. It is not a probable intention to ascribe to the testator that the interests of some of the class should be vested, whilst the interest of others of the class were in contingency.

My opinion, therefore, is, that the children who attained twenty-one in the life of Elizabeth, and have since died, took vested interests.

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 IIVISON v. GASSIOT.

May 5, 1853.

*Assignment by Debtor of Stock in Trade — What passes.*

Under an assignment to creditors by a debtor of all his stock in trade, book and other debts, goods, securities, chattels, and effects whatsoever, except the wearing apparel of himself and his family:—

*Held*, that a contingent interest in the residuary estate of a testator (to which the debtor was entitled in the event of his sister dying without a child) passed.

*Pope v. Whitcombe*, 3 Russ. 124, observed upon.

THIS was an appeal from the refusal by the Master of the Rolls of a motion for payment into court of a sum of 93*l.* 16*s.* 10*d.* consols, and for an injunction.

By a composition deed, dated the 8th of July, 1831, and made between John Park, of the first part, Charles Moore and Edward Rawlings, of the second part, and the several persons whose names were thereunto subscribed, and seals affixed, creditors of John Park,

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of the third part, it was witnessed that, in consideration of the release thereafter contained, John Park assigned unto Charles Moore and Edward Rawlings all and singular the stock in trade, book and other debts, goods, securities, chattels, and effects, whatsoever and wheresoever, of or belonging, or due or owing to John Park, or wherein or whereto he was in anywise interested or entitled, (except the wearing apparel of John Park and his family,) together, also, with all profits and produce of the thereby assigned property and premises, and all securities, books, accounts, vouchers, and writings and documents whatsoever relative thereto, and all the right, title, interest, benefit, property, claim, and demand whatsoever, of him, John Park, of, in, and to, or in respect of the same, to hold, receive, take, and enjoy all and singular the furniture, stock, debts, effects, and other the premises thereby assigned, or intended so to be, unto and by Charles Moore and Edward Rawlings, their executors, administrators, and assigns, absolutely, together with full power for them, as the true and lawful attorney or attorneys of John Park, to ask, demand, and receive, and by action, suit, or otherwise to sue for and receive all the said goods, stock, debts, and effects thereby assigned. And it was thereby declared and agreed that the said stock in trade, debts, goods, securities, chattels, effects, and other the premises assigned, were so assigned unto Charles Moore and Edward Rawlings upon trust as soon as conveniently might be, to sell and dispose thereof as therein mentioned, and to stand possessed of the moneys to be received under the trusts; upon trust, in the first place, to pay the costs and expenses therein mentioned, and, in the next place, thereout to retain and reimburse all advances made to John Park, or otherwise for or in respect of carrying on his business as thereafter mentioned, with interest at the rate of 5% per cent. per annum, on all advances to be made by the trustee or trustees, out of their own funds, and subject thereto upon trust to pay and discharge all the debts of the parties thereto of the second and third parts ratably, without preference, as far as the said moneys would extend, and to be in full discharge of the debts of the said respective creditors; and if there should be any surplus of the said trust moneys and premises, after satisfying the trusts aforesaid, then, upon trust, to pay over and assign the same unto John Park, his executors, administrators, and assigns. And in the indenture was contained a power for the trustees to allow John Park to continue his business, or to collect on account of the trustees all or any of the debts thereby assigned; and also a power for the trustees for the time being, if so they thought proper themselves to carry on the said business, so long as they should think prudent for the benefit of the trust estate. And John Park thereby (amongst other things) covenanted with the trustees to do and execute all such further and other acts and things relating to the premises as the trustees or their counsel should reasonably require for the better and more effectually assuring the said furniture, stock, debts, effects, and premises thereby assigned upon the trusts aforesaid; and that John Park would at all times thereafter, upon every reasonable request, attend the trustees, and disclose and explain his whole property and

effects intended to be thereby assigned, and all circumstances attending the same. And it was thereby further witnessed that, in consideration of the assignment and covenants of John Park thereinbefore contained, the aforesaid creditors, parties thereto of the second and third parts, each as well for himself as his respective partners, did remise, release, and forever quitclaim unto John Park, his heirs, executors, and administrators, and also him and them, and his and their estate and effects, of and from all debts due and owing to them the said creditors, parties thereto, from John Park, and all actions, suits, claims, and demands whatsoever at law or in equity, or otherwise howsoever.

The question was, whether the deed extended to and comprised an interest to which John Park became entitled in part of the personal estate of his father Joseph Park, deceased, under the following circumstances: Joseph Park by his will, dated the 11th of August, 1820, bequeathed all his residuary estate to his brother Thomas Park and John Wylie, upon trusts for sale; and after payment of debts, to invest the residuary estate, upon trust as to one moiety for John Park, and as to the other moiety thereof for his sister, the testator's daughter, Mary Ann Park. The testator died shortly after the date of his will.

By an indenture of settlement dated the 26th of May, 1826, and made between Mary Ann Park of the one part, and Thomas Park, since deceased, and the defendant John Peter Gassiot of the other part, Miss Park assigned unto Thomas Park and John Peter Gassiot all that the said moiety or half part or share of her the said Mary Ann Park, of and in the residue of the estate and effects of Joseph Park, her late father, on certain trusts for her and her children. And in case there should be no child or children of Miss Park living at the time of her death, nor the issue of any child or children dying in her lifetime, leaving lawful issue living at her death, or being such children or child, or issue, he, she, or they should die before he, she, or they should have acquired a vested interest in the said trust estate and premises; then upon trust to pay, assign, and transfer the said trust estate and premises, or the securities upon which the same should from time to time be invested, unto John Park, his executors, administrators, or assigns; absolutely for his and their own use and benefit.

In 1844 John Park died, and in June, 1848, Mary Ann Park died without having been married.

The present suit was instituted by one of the creditors, who were parties to the composition deed, on behalf of himself and all other the creditors of John Park who were entitled to the benefit of the composition deed. The bill sought a declaration that the moiety theretofore of Mary Ann Park, deceased, and settled by the indenture of the 26th of May, 1826, of and in the residuary estate of the testator Joseph Park, deceased, became and then was subject to the trusts of the indenture of the 8th of July, 1831, and ought to be applied and disposed of accordingly. The bill also sought to have the requisite accounts taken, and the trust moneys and premises

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applied in a due course of administration, in paying to plaintiff and the other creditors of John Park, deceased, who were or might be entitled to the benefit of the composition deed of July, 1831. It further sought an injunction to restrain the defendant, John Peter Gassiot, from paying, assigning, or disposing of, otherwise than under the order and direction of the court, the moneys, stocks, funds, and securities, subject to the trusts, and the appointment of a receiver.

The defendant Gassiot admitted a balance of 93*l.* 16*s.* 10*d.* to be in his hands, and the motion which was the subject of appeal, was for payment of this amount into court, and for an injunction as prayed by the bill.

*Lloyd* and *Hallett*, in support of the appeal.

The Master of the Rolls held that he was bound by the decision in *Pope v. Whitcombe*, 3 Russ. 124. We submit, however, that if there was nothing more in the deed affecting the question than appears upon the report of that case, the decision cannot be supported. There was, perhaps, in that case, some context interpreting and confining the words of the deed otherwise than according to their ordinary signification. But the cases are, moreover, distinguishable; for here the exception of the wearing apparel is stronger than any thing which appears to have been in the deed, in *Pope v. Whitcombe*, to show that the word effects must be taken in its most exclusive sense.

They also referred to *Arnold v. Arnold*, 2 Myl. & K. 365; *Parker v. Marchant*, 1 Y. & C. C. C. 290.

*Palmer* and *Eddis*, for the respondents.

The words in *Pope v. Whitcombe* were larger than those in the present case, for they included the word "estate" as well as the word "effects," which is alone used here. The word "estate" is of larger import than the word "effects." The word "effects," in its ordinary signification, means tangible property, and not *choses in action*.

Knight Bruce, L. J. I need not give any opinion upon the construction of the instrument which was before the court in *Pope v. Whitcombe*. The Master of the Rolls considered that the cases could not be distinguished, and therefore that he was bound to put on the deed now before the court the limited construction which was put upon the assignment in *Pope v. Whitcombe*. I do not, however, consider that we are bound, because the instrument in *Pope v. Whitcombe* was construed in a particular manner, to construe in the same way that now before us. It is impossible to say what interpreting, restricting, or correcting context there may have been in the former instrument without seeing every word of it. We do see every word that the instrument in this case contains, and thus much is plain, that the words here, according to their proper and technical interpretation, do include this property. That, however, would be nothing if there were a restrictive context. I have looked, in vain, for such a

*Re Stephenson's Trusts.*

context, and, not finding it, I must hold that the words ought to be understood according to their proper and technical construction as including this property.

TURNER, L. J. I think that there is a plain distinction between this case and *Pope v. Whitcombe*. It is true that the general words there were the same as in this case, or even more extensive. But in the present case there is an exception of the assignor's wearing apparel. What is the effect of that exception? Why, that all the assignor's property, with that exception, was intended to pass. A similar circumstance was relied upon in *Hotham v. Sutton*, 15 Ves. 326, where Lord Eldon said: "With respect to the second question, the doctrine appears now to be settled in this court that the words 'other effects,' in general mean effects *ejusdem generis*. I cannot help entertaining a strong doubt, whether this testatrix, if asked whether she meant effects *ejusdem generis*, or contemplated the share of all which she had considered her effects in the will, would not have answered that the latter was her meaning. Her expression is conclusive upon that. Money cannot be represented as *ejusdem generis* with plate, linen, and household goods. The express exception of money out of the 'other effects,' shows her understanding that it would have passed by those words; that express words were required to exclude it; and by force of the exclusion in the excepted article, she says she thought that the words of her bequest would carry things not *ejusdem generis*. This disposition must, therefore, be taken to comprehend all that she has not excluded, which is money only.

Giving no opinion upon *Pope v. Whitcombe*, I think that in this case the contingent interest passed.

*Order made.*

In the Matter of the Trust of JANE STEPHENSON, deceased, and of the 10 & 11 Vict. c. 96; *ex parte* STEPHENSON.

May 8, 1853.

*Marriage Settlement.—Construction.*

Upon the marriage of one of several residuary legatees under her father's will, the intended husband and wife assigned to trustees all and every the sum and sums of money, legacy and legacies, and other personal property then due and payable, or belonging to, or to become due and payable to the intended wife under or by virtue of her father's will, "or otherwise howsoever," upon trusts for her separate use for her life, without power of anticipation, with trusts in remainder in favor of the children of the marriage. By the next witnessing part of the same settlement, it was agreed, that in case any real or personal property should, during the coverture, be given or bequeathed to the wife, the husband should settle it upon trust so that the wife should have the sole power of disposing of the same:—

*Held*, that a legacy bequeathed by another will to the wife after the marriage was not subject to the trusts for the children, the latter witnessing part of the settlement showing that the former must be read in a restricted sense.

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*Re Stephenson's Trusts.*

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THIS was an appeal from the decision of the Master of the Rolls upon a petition under the Trustees' Relief Act; and the question was whether a mortgage executed by a husband and wife of an interest to which the wife became entitled under a will was effectual, which question depended upon another, namely, whether, according to the true construction of their marriage settlement, the property was comprised in the second or the third witnessing part of that deed.

The following were the circumstances of the case:—

Charles Ambrose Stephenson, by his will dated the 19th of June, 1812, gave the residue of his real and personal estate to trustees; upon trust, after paying certain annuities which had determined, for all and every of his children, equally to be divided amongst them share and share alike, the share and interest of every son to be paid or transferred at his age of twenty-five years, and the share and interest of every daughter to be paid and transferred at the age of twenty-one years, or on the day of her marriage, which should first happen.

The testator died in June, 1812, leaving six children surviving him, of whom Louisa, afterwards the wife of William Field, and Jane Stephenson, were two. All the daughters attained twenty-one, and the sons twenty-five years.

The executors of Charles Ambrose Stephenson assented to the bequest of the testator's residuary estate.

The settlement on which the question arose, and which was executed on the 1st of May, 1820, in contemplation of the marriage of Miss Louisa Stephenson and Mr. William Field, was made between William Field of the first part, Louisa Stephenson of the second part, and the petitioner Charles Doyley Stephenson and James Field of the third part. It recited the intended marriage, and that William Field was possessed of a policy of assurance on his own life for the sum of 1,000*l.* effected in the Equitable Assurance Office. It also recited that, under and by virtue of the will of Charles Ambrose Stephenson, Louisa Stephenson was entitled to certain legacies, sum or sums of money, or other personal estate; but the particulars and amount of the same, so far as the same had not then been paid or transferred to her, was not then fully ascertained. And it recited that upon the treaty of the said marriage, it had been proposed and agreed that for making some provision for Louisa Stephenson and the issue (if any) of the same marriage, the sum of 1,000*l.* so secured or made payable on the death of William Field as aforesaid, and also the said sum or sums of money and other personal property to which Louisa Stephenson was entitled under the will of her father, Charles Ambrose Stephenson, or otherwise howsoever, should be settled and assured upon the trusts thereafter expressed. By the first witnessing part it was witnessed, that in pursuance and part performance of the agreement, and for the nominal consideration therein mentioned, William Field granted unto the petitioner Charles Doyley Stephenson and James Field, their executors, administrators, and assigns, the said policy of assurance for 1,000*l.*, and the sums of money secured thereby upon the trusts, from and immediately after the solemnization of the said then intended marriage, thereafter expressed and declared. By

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the second witnessing part it was witnessed, that in further pursuance and performance of the said recited agreement, and for the nominal considerations therein mentioned, she, the said Louisa Stephenson, with the privy and approbation of the said William Field, did grant, bargain, assign, transfer, and set over unto the petitioner Charles Doyley Stephenson and James Field, their executors, administrators, and assigns, all and every the sum and sums of money, legacy, and legacies, and other personal property then due and payable, or belonging to, or to become due and payable to, Louisa Stephenson, under or by virtue of the last will and testament of Charles Ambrose Stephenson, her deceased father, or otherwise howsoever, and all interest, proceeds, or accumulations (if any) of the said respective sums of money and premises, or any of them, to hold the same premises unto the petitioner Charles Doyley Stephenson and James Field, their executors, administrators, and assignees, until the said intended marriage, and from and after the solemnization thereof, upon the trusts hereinafter expressed, declared, and contained concerning the same. These trusts were for the separate use of Louisa Stephenson for her life without power of anticipation, remainder to James Field for life with remainder to the children of the marriage. The deed contained a third witnessing part, whereby it was declared and agreed, and William Field did thereby, for himself, his executors, and administrators, covenant and agree with the petitioner Charles Doyley Stephenson and James Field, their executors and administrators, that in case the said intended marriage should be solemnized, and any property, real or personal, or mixed, should at any time during the said intended coverture be given or bequeathed to, or in any manner howsoever vest in, Louisa Stephenson, then and in that case he, the said William Field, as far as he lawfully might or could, would or should, either alone, or in concurrence with the said Louisa Stephenson, and at the costs and charges of such property, do all such acts whatsoever as should be necessary and proper for settling the same property for all the estate and interest of Louisa Stephenson, or of William Field, as her husband therein, in such manner that the said Louisa Stephenson might have the sole power of disposition over the same, notwithstanding her coverture, and in such manner that in the mean time and until such disposition should be made, the said property, and the rents, profits, dividends and interest, income and produce thereof might belong to, and to be held in trust for, the said Louisa Stephenson, for her sole and separate use, notwithstanding her coverture; and also in the mean time, and until such settlement should be made, the said William Field, as far as he might be interested in any such property, should stand and be seised or possessed of and interested in the same, upon trust for the sole and separate use of the said Louisa Stephenson, his said then intended wife.

There had been two children only of the marriage, namely, Frederick Field, since deceased, and the petitioner, Mary Louisa Field, who attained her age of twenty-one on the 30th of November, 1843.

Jane Stephenson, one of the daughters of the testator Charles Ambrose Stephenson, by her will dated the 26th of April, 1843, after

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making certain specific and pecuniary bequests, gave and bequeathed all the residue of her personal estate and effects in possession, reversion, remainder, and expectancy unto her brothers, the petitioner Charles Doyley Stephenson and Augustus Stephenson, and her sisters Louisa Field and Emma Harmer, equally to be divided between or among them, their executors, administrators, and assigns respectively, share and share alike; and she appointed the petitioner Charles Doyley Stephenson and Augustus Stephenson, executors of her will. She died on the 11th of May, 1843, and her will had been proved by Augustus Stephenson alone.

By the mortgage deed in question, which was dated in February, 1845, and executed by William Field and Louisa his wife of the first part, Louisa Okey Stephenson of the second part, and George Peart of the third part, reciting the settlement and the will of Jane Stephenson, and reciting that there was then standing in the names of William Harmer and the petitioner, Charles Doyley Stephenson, the sum of 13,580*l.* 8*s.*, old South Sea annuities, being the then existing residue of the personal estate of the testator, Charles Ambrose Stephenson, and that the share of Jane Stephenson in such residue would, on the decease of Louisa Okey Stephenson, the testator's widow, amount to the sum of 2,846*l.* 11*s.* 6*d.* like annuities, of which the sum of 711*l.* 13*s.* 8*d.* like annuities, being one fourth share thereof, would be the property of and receivable by William Field and Louisa his wife, or William Field in right of his wife, it was witnessed that in consideration of 450*l.* to William Field and Louisa his wife, paid by George Peart, William Field, and Louisa his wife, and each of them, thereby assigned to George Peart, his executors, administrators, and assigns, all the right, title, and interest of them the said William Field and Louisa his wife, and each of them, in and to the bequest and share of residue to and of the said Louisa Field in and by the last will and testament of the said Jane Stephenson, deceased, bequeathed to her as therein mentioned, subject nevertheless to a proviso for redemption upon payment of the above-mentioned sum of 450*l.*, with interest.

By the order under appeal it was declared, that the share of Louisa Field in the estate of the late Jane Stephenson passed by the assignment contained in the settlement of the 1st of May, 1820, and was subject to the trusts, by that indenture declared for the benefit of Louisa Field and her children; and that the interest of Louisa Field in the same was not affected by the indenture of the 25th of February, 1845. And it was ordered that the sum of 592*l.* 6*s.* 4*d.* bank 3*l.* per cent. annuities, standing in the name of the accountant-general, in trust, "In the matter of the trust of Jane Stephenson, deceased," should be transferred to the trustees of the settlement, to be held by them upon the trusts thereby declared for Louisa Field and the children of her marriage with William Field.

*Rolt and Speed*, were for the appellants.

*James, Osborne, and Cole*, for the respondents.

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Fleming v. Self.

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TURNER, L. J. With great respect to the Master of the Rolls, I have arrived at a different conclusion from his Honor in this case. The terms of the second operative part of the marriage settlement are these (his lordship read them). If that had stood alone, there could have been little doubt as to its extending to all future property. But it must be construed with the rest of the instrument, and in a subsequent part of it there is an express agreement between the parties, and there is a covenant on the part of the husband to this effect. (His lordship read the covenant set out above for the settlement of future property.) Now, if the construction contended for by the respondents could be maintained, the effect of the second operative part would be such that there could be no personal property to which the subsequent operative part could apply. The effect of that construction, therefore, would be to strike out of the deed all the words of the subsequent operative part relating to personal estate. That is a consequence which ought to be avoided if any other reasonable interpretation can be put upon the words. It is also to be observed that the second operative part follows the words of the recital.

It appears to me that the second operative part should be confined to the property to which Mrs. Field was entitled at the time of the settlement.

KNIGHT BRUCE, L. J. The property in question was derived under the will, and merely under the will, of a person who was alive when the settlement was executed, and when the marriage took place. In that state of things I give no opinion, whether if the third operative part had been out of the deed this property would have been affected by the instrument, for, *omni considerata scriptura*, I am unable to conclude that this lady, having been persuaded by her husband to mortgage this property, was not able to do it.

*The order was discharged, and an account directed of what was due upon the mortgage.*

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FLEMING v. SELF.

July 15, 19, and 22, and November 21, and December 9, 1854.

*Benefit — Security — Redemption — Arbitration.*

The owner of shares in a benefit building society gave a mortgage security on leaseholds for sums advanced to him by the society in respect of his shares; he subsequently gave notice of his desire to redeem the mortgaged premises, and a difference having arisen as to the terms of redemption, he filed a claim. The Lord Chancellor made a decree for redemption, directing calculation of the longest possible duration of the society at the date of the notice, having regard to the net assets of the society and to the monthly subscriptions and redemption money still continuing payable and to the number of 100l. shares to be provided for, and charging the plaintiff as a present debt with all subscriptions and redemption money which would become payable by him assuming the society to endure for the

*Fleming v. Self.*

whole of the calculated period, and crediting him with the amount of bonus payable at the date of the notice to withdrawing members.

The provisions as to arbitration contained in the 27th section of the act 10 Geo. 4, c. 56, and which are incorporated into the act 6 & 7 Will. 4, c. 32, do not apply to questions such as those raised on the above claim, the determination of which depended partly on the construction of the rules of the society and partly on the meaning of the mortgage deed and the mode of giving effect to it.

THE plaintiff in this suit, Thomas Brandon Fleming, was the owner of fifteen shares in the Camberwell Building and Investment Society, which commenced business on the 6th November, 1843;<sup>1</sup>

1. The society was established in 1843, under the provisions of the act 6 & 7 Will. 4, c. 32, intituled: "An Act for the Regulation of Benefit Building Societies;" and the following are such portions of its rules as are referred to in the arguments and judgment above given.

7. *Subscriptions and Mode of Payment.*—That every person entering this society, on or before the third monthly meeting, shall pay the sum of two shillings and sixpence per share, as entrance money; and after that period shall pay such sum per share, as entrance fee, as the directors shall appoint, until the directors shall fix upon a greater amount as a bonus. That every member of this society shall, on the first monthly meeting, commence paying his or her subscription money, or sum of eight shillings and sixpence per share, for each and every share he or she may hold, and shall afterwards continue to pay his or her subscription money, of eight shillings and sixpence per share, with all fines that may be due from him or her, on the day of every succeeding monthly meeting, until the objects of the society have been fully accomplished; such payments to be made to the secretary during the first two hours of meeting, or at such other hours as the directors may appoint; and every member neglecting to pay his or her subscription shall be fined for each share as follows: fourpence for the first month, eightpence for the second month, one shilling for the third month, one shilling and fourpence for the fourth month, one shilling and eightpence for the fifth month, two shillings for the sixth, and three shillings and sixpence for each subsequent month; and any member not having executed a mortgage to the society, as hereinafter mentioned, continuing to neglect the payment of his or her monthly subscriptions, until the fines incurred thereby shall equal all the moneys actually advanced by him or her, exclusive of the entrance fees, shall thereupon be expelled the society, and forfeit all his or her interest therein. That if any member shall be in arrear in respect of his or her subscription or fines, for more than one month, every payment that shall afterwards be made by such member, if not sufficient to discharge the whole thereof, shall be applied first to the liquidation of what shall be owing for the first month in which he shall have been in arrear, and then in discharge of the arrears of each succeeding month. That each member shall contribute annually sixpence to the postage fund.

8. *Admitting Members after Commencement.*—That any person entering this society after the third monthly meeting, or already being a member thereof, and taking up or subscribing for an additional number of shares, shall pay the full amount of his or her subscriptions for such share or shares from the commencement of the society to the period when such person shall become a member of this society, or, already being a member thereof, to the period when such member or members shall subscribe for an additional share or shares, together with such further sum as the directors may, from a calculation of the profits, deem reasonable, either in one payment, or in such instalments as the directors may think fit. That whenever the directors shall have determined the amount of such instalments, the same shall be paid with, and in addition to, the monthly subscriptions, which shall thenceforth become payable in respect to each new share; and should such person or persons neglect or fail in the payment of the instalment, he or she shall be liable not only to the payment of the fines imposed for the non-payment of subscription, but also shall be liable to the payment of fines for the non-payment of such instalments. That the amount of fines for the non-payment of instalments shall, for every share, be in the same ratio as such instalments shall bear to the monthly subscriptions, payable upon an entire or original share.

he had mortgaged to the society certain leasehold property as a security for the repayment of sums advanced to him by the society in respect of his shares; the mortgages were dated the 3d August, 1847, and the 10th December, 1847, respectively; he subsequently claimed

9. *Mode of advancing Money by Sale of Shares.*— That so often as the funds of the society shall amount to a share or sum of 100*l.* (or by anticipation, that is, before the funds actually amount to that sum, if the directors shall so determine,) the share shall be awarded to the highest bidder by premium for the preference, (but no member shall be allowed to advance less than five shillings on each bidding,) and the purchaser shall have the privilege of taking as many additional shares at the same rate as the directors may award him, not exceeding nine, on giving notice of such an intention to the chairman at the time of sale; and the directors shall, if they deem it to the advantage of the society, have the power to sell an additional share or shares, quarter, half, or three quarter share at the same rate of premium as the last purchase, if required. That if two or more members offer the same sum as the highest bidding for a share, and that sum be the minimum price, or reserved bidding, they shall ballot for the share; and the party then entitled to it shall pay a deposit of one pound on account of his next subscription money, the same to be forfeited if the share be not taken, pursuant to the 12th rule. That such sales shall take place at such time and place as the directors may appoint. That previous to the sale the chairman shall declare the amount which the purchaser will be required to pay for arrears, or back payments of subscriptions, from the commencement of the society. That the biddings shall be taken by ticket, three times successively, and the person ultimately offering the largest price shall be the purchaser. That whenever a member shall purchase a greater number of shares than he shall have previously subscribed for, the sum of one pound shall be forthwith paid on each share to the secretary, as part of the subscription money payable thereupon; and all other payments shall be made pursuant to Rule VII.; and, in default thereof, the said sum of one pound per share shall be forfeited, and the directors shall have power to resell such share or shares.

10. *Minimum Price of Shares.*— That the reserved bidding at which the shares shall be put up, shall be fixed at not less than forty pounds for the first year, and, at subsequent sales, at such prices as the directors shall determine from time to time.

12. *Security for Money advanced on Shares sold.*— That when any member shall have been awarded his or her share or shares, pursuant to Article IX., he or she shall forthwith give notice of the situation of the premises intended to be offered for the security thereof to the secretary, who shall forthwith transmit a copy of the same to the surveyor, together with the surveyor's fee, as mentioned in the fourth rule, and the surveyor shall, within seven days after the receipt thereof, examine the premises mentioned in such notice, and make his report in writing to the directors at the next meeting. That when the directors shall be satisfied that the premises so to be offered as aforesaid are a sufficient security to the society, they shall authorize the trustees to pay to such member the sum or sums of money which he or she shall be entitled to receive, on such member executing a mortgage of such premises as the solicitor to the society shall require, and deliver the same, and all other necessary title-deeds relating thereto, to the solicitor to be deposited with the trustees, as a security to the said society, for so much money as shall therein be expressed to be secured, and the trustees shall make such payment accordingly. That if previously to any member being so entitled to his or her share or shares, he or she shall be desirous of ascertaining the amount which the directors shall be willing to advance on certain premises, notice thereof shall be given to the surveyor, with one guinea on account of the fees, and an examination and a report thereon made, as above mentioned; and the directors shall communicate to such member the amount they shall deem proper to be advanced on such premises, at the cost of the applicant. That whenever any property mortgaged to the society shall be subject to any chief or ground-rent, the member to whom the property shall belong shall furnish the secretary with a statement containing the amount of the rent, the name and address of the person or persons to whom, and the day or respective days on which the same shall become due and payable, and shall, from time to time, produce to the secretary an acknowledgment or voucher for the payment thereof before the period

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to be entitled to redeem the premises so mortgaged upon the terms of repaying the amounts advanced to him by the society, less the amount of subscriptions which he had paid, and the proportion of profits in the society to which he was entitled. The trustees of the

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prescribed for such payment shall have elapsed; and in case the rent shall not have been duly paid, the directors shall order the amount thereof to be advanced out of the society's funds to the secretary, who shall pay the same accordingly. That should such member neglect to furnish such statement and to produce such acknowledgment or voucher, or at the next monthly subscription day which shall succeed such advance, to repay the same, he or she shall, for each default, pay a fine of five shillings. That if any member has purchased one or more share or shares for the purpose of building, he shall be at liberty to employ any surveyor or builder to survey or build for him; but in that case the surveyor of the society must first approve of the plans and specifications of the intended buildings, copies of which are to be left with him, so that he can satisfy himself that the plans and specifications are adhered to; and he is to certify how much of and when the share or shares purchased, not exceeding 75*l.* per cent. may be advanced to such member as the buildings proceed, in sums of not less than 25*l.* each, except as the balance. He is also to report the amount of insurance to be effected upon the building. That in no case shall any property be deemed a sufficient security for any moneys to be advanced by the society which shall be subject to any previous mortgage, except to this society, or which shall be held for any term of years subject to an annual rack rent. That when any trustee shall become the purchaser of a share, or do any act moving from himself, then all securities and undertakings shall be made to the other trustees. That should any member after receiving any portion of his or her share or shares, leave the building upon which the same shall have been advanced unfinished, to the prejudice or risk of the society, the directors (having first given fourteen days' notice to the member of such their intention) shall be at liberty either to sell such premises, or to employ any person or persons to finish and complete the same at the costs and charges of the member, and to advance and pay the sum or sums of money requisite for such purpose accordingly. That in the said mortgage deed, it shall be specified that in case the said member shall at any time thereafter fail, neglect, or refuse for six calendar months to pay, observe, and perform, all or any of his or her subscriptions, payments, and regulations, on his or her part respectively to be paid, observed, and performed, then the trustees, or directors for the time being may appoint a person or persons to collect the rents and profits of the premises therein mentioned; but should the same be insufficient to satisfy the purpose aforesaid, then the trustees, or the directors in their names, may, without the concurrence or consent of the said member, absolutely sell and dispose of all or any part of the said premises by public auction, but in case no public sale can be effected, then by private contract, for the most money that can be had or gotten for the same, and shall receive the purchase-money arising therefrom; and at such public sale the trustees or directors, or one of them, or some other person to be appointed by him or them, in writing, shall be allowed to buy in the premises on behalf of the society, and to resell the same without being answerable for any loss that may be occasioned by such resale; and out of the money to arise from such collection of rents and profits, or such sale as aforesaid, the directors for the time being shall in the first place discharge all costs, charges, and expenses, which may be incurred on account of such collection of rents, or sale or sales, or in anywise relating to the trusts therein contained; and in the next place shall retain and reimburse themselves, and the said society, all such subscriptions, and other payments, as shall then be due, owing, and payable by such member, under and by virtue of these rules, and the mortgage deed, and the moneys so retained for the said society shall immediately be placed with the society's bankers to the account of the trustees, for the use and benefit of the society, and they shall and will pay the surplus (if any) arising from such sale or collection of rents to the said member, or to such other person or persons as he or she shall, by writing under his or her hand, direct or appoint to receive the same; and in the said mortgage deed it shall, amongst other things, be declared that the receipt or receipts of the trustees, or any one or more of them, for the time being, acting under that deed, shall be a sufficient discharge and

society, however, disputed his right to redeem on these terms; and, in January, 1849, the suit of *Seagrave v. Pope* was instituted by T. B. Fleming, jointly with W. Seagrave, to whom he had sold the property, to decide the question as to the terms on which the redemp-

discharges to all tenants and purchasers paying any money to such trustees, without being accountable for the misapplication or non-application thereof, and that the purchaser or purchasers shall not be required, or under the necessity of inquiring, into the propriety of such sale or sales, nor whether any such default or deficiency shall have taken place. That the costs of and attending the investigation of the title to property offered to the society shall be paid by the member offering the same, whether such security be ultimately accepted or not, and shall be recoverable as a debt due to the society, and the member shall make such deposit on account of the said costs as the directors may think fit.

13. *Directors may add to Surplus Money part of Profits.*—That when any sales shall take place of any property mortgaged to this society, the directors shall have power and authority to add to any surplus moneys remaining in the hands of the trustees after satisfaction of the several purposes above mentioned, a proportion of the profits of the society made up to the time of such sale or sales, equal to that which shall at the time be allowed to members withdrawing; and the directors may order the trustees to pay the same to the member, with, and in addition to, the surplus moneys to which he shall be entitled.

14. *Power to Sell, Exchange, or Redeem Property in Mortgage.*—That if any member of this society, having purchased any share or shares, and secured the repayment thereof upon his or her premises, shall sell such premises, it shall be lawful for the purchaser to take the same, chargeable with the debt due to the society, and thenceforth to become answerable to the society for the payments of the subscriptions and other charges, as the same shall become payable, on such purchaser signing such agreement as the solicitor to the society may require, for paying the subscription money and other payments to be made by him. That if any member shall be desirous of having his or her property discharged from such debt, it shall be lawful for the holder of such share or shares, or so much thereof as shall be then unpaid, to transfer the same to some other premises of adequate value, to be approved of by the surveyor of the society, and upon having such share or shares, or so much thereof as shall be then due in respect thereof, secured on other premises to the satisfaction of the solicitor, the trustees for the time being shall, at the cost of the member, release and convey the premises for which other premises shall have been substituted, and make such indorsement as hereafter mentioned; and in the first-mentioned event shall also, but at the cost of such member, release him or her from all future liability in respect of the premises upon the shares purchased from the said society, and secured upon the premises sold as before mentioned. That if any member of this society, who shall have received his or her share or shares, or any portion of them, shall be desirous of paying and satisfying the security or securities which shall have been given for the same, and shall give notice of such his or her desire to the directors, the directors shall, within one month thereafter, award to such member the same proportion of profits per share, as is allowed on the withdrawal of unpurchased shares; and the directors shall make a deduction of such profits and of the amount of subscriptions paid in by such member, from the full amount expressed to be secured in and by the mortgage; and the directors are hereby authorized and empowered to receive the balance, in one payment, or by such instalments as the directors and member shall agree upon; and on the payment of the balance, together with all fines and other sums due in respect of such shares, the directors shall desire the trustees to deliver up all deeds and other documents in their custody relating to the security of the member, on such property, and at his or her cost to indorse a receipt or acknowledgment on such mortgage, according to 6 & 7 Will. 4, c. 32, s. 5.

16. *Members withdrawing.*—That any person who shall be desirous of withdrawing from this society any share or shares which shall not have been purchased according to rule VIII., shall be allowed to do so on giving one month's notice, in writing, of his or her intention, to the directors, at any general meeting of the society, and the money

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count to be taken of all subscriptions redemption-moneys, and other payments due and owing, and payable, and thereafter to become due and owing, and payable by the plaintiff to the defendants, the trustees in respect of his shares under and by virtue of the indentures of the 3d August, 1847, and the 10th December, 1847, respectively, and the rules and regulations of the society, and in taking the said account, the probable duration of the society according to the rules and regulations, to be calculated; and all money which (having regard to such probable duration) might, at any time thereafter, become due from the plaintiff to be considered as due at the time of taking the said account; and referring it to the proper taxing-master to tax the defendants their costs in the suit; and ordering the plaintiff to pay to the defendants what should be certified to be due to them for such subscriptions, redemption-moneys, and other payments and costs within six months after the chief clerk should have made his certificate, at such time and place as should be thereby appointed; and thereupon ordering the defendants to indorse a receipt or acknowledgment of payment on the mortgage deeds pursuant to the act of parliament and according to the rules and regulations of the society, and to deliver up all deeds relating to the mortgaged premises; but in default of the plaintiff paying to the defendants what should be reported to be due to them for such subscriptions, redemption-moneys, and other payments and costs, ordering the plaintiff's claim to be absolutely dismissed as against the defendants, with costs.

The plaintiff then gave notice of motion before the Court of Appeal that the order of the Vice-Chancellor might be varied, and that it might be declared that he, the plaintiff, was entitled to have allowed him the same amount of bonus, or portion of profits, upon each of his fifteen shares, as, according to the rules of the society and the resolutions of the directors, was allowed to withdrawing members whose shares had not been purchased or taken up as provided for by the rules, and that the total amount of such bonus or proportion of profits might be ascertained, and that it might be declared that the duration of the society for the term of eleven years from the commencement thereof, ought to be taken and adopted as the basis upon which the account, by the order directed to be taken, should proceed; and that, after deducting the subscription and other moneys, if any, which might be payable by him from the amount of the said bonuses or profits, the balance thereof might be paid to the plaintiff, or that the plaintiff might be allowed to redeem the mortgaged property in the claim mentioned, upon such other terms and in such manner as their lordships should think fit to direct.<sup>1</sup>

*Daniel and Hardy*, for the plaintiff, were proceeding to open the appeal.

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<sup>1</sup> The appeal was set down to be heard before the lords justices, and was in the first instance heard before their lordships on the 6th and 9th June, 1854; it was however subsequently, at the desire of their lordships, reheard before the Lord Chancellor.

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*Rolt* and *Terrell*, for the defendants, the trustees of the society, took the same preliminary objection that had been raised before the Vice-Chancellor, namely, that the question in dispute ought to have been submitted to arbitration, being a question simply of construction of the society's rules, and that, consequently, the court had no power to deal with the matter. The thirteenth rule of the society, taken in connection with the twenty-seventh and twenty-eighth sections of the act 10 Geo. 4, c. 56, as extended by the fourth section of the act 6 & 7 Will. 4, c. 32, to societies established under that statute, showed that this court was not the proper tribunal. They referred to *Crisp v. Bunbury*, 8 Bing. 394; and *Ex parte Payne*, 5 Dowl. & L. 679; and they distinguished the present case from *Morrison v. Glover*, 4 Exch. Rep. 430, and from *Cutbill v. Kingdom*, 1 Exch. Rep. 494.

*Daniel* and *Hardy*, for the plaintiff, submitted that the point in dispute clearly involved matter not within the scope of the rules; the plaintiff was suing as mortgagor, and not as a member. They relied on *Morrison v. Glover*, 4 Exch. Rep. 430.

The LORD CHANCELLOR expressed his opinion to be, that the court clearly had jurisdiction; the question at issue was partly on a collateral matter, and did not arise entirely out of the society's rules. Although, therefore, he would not finally decide the point on the present occasion, he should allow the argument on the merits to proceed.

*Daniel* and *Hardy* then proceeded with their argument. The plaintiff did not seek to disturb any thing done in *Seagrave v. Pope*; by becoming a mortgaging member, he had not ceased to have an interest in the profits of the society, and he claimed, in respect of these, to be in the same position as a withdrawing member. It had been assumed that a member in the position of the plaintiff received his 100l. share at a discount, but this assumption was not sound; what he received was a sum of money on account of his share, which then went to the society, but this did not deprive him of his right to participate in future profits. It was a most improbable thing that so hard a bargain as that, imposed on the plaintiff by the principle worked out in the decree of the Vice-Chancellor, should ever have been contemplated, for, according to it, the plaintiff might have to make payments, for an indefinite time, without getting any good for them. They referred to the eighth, ninth, twelfth, thirteenth, fourteenth, thirty-second, and thirty-third rules. The Vice-Chancellor had followed what was done in *Mosley v. Baker*, 6 Hare, 87, affirmed on appeal by Lord Cottenham,<sup>1</sup> 1 Hall & Twells, 301; but that case did not apply to the present, for, there the society had not continued long enough to entitle the plaintiff to any profits, and there was,

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<sup>1</sup> See note of the case at the end of this report.

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moreover, in the mortgage deed, an express provision for calculating the probable duration of the society.

*Rolt*, (with whom was *Terrell*,) for the defendants, submitted that it was impossible to adopt the plaintiff's view of his own position, consistently with the decisions in *Seagrave v. Pope*, and *Mosley v. Baker*. Looking at the natural course of proceeding in these societies, it would be found to give rise to three classes of members, namely: first, investing or continuing members; secondly, mortgaging members, who sold their shares but continued liable to make payments; and, thirdly, withdrawing members, who took out their shares and did not continue liable. Then, considering the meaning of the terms used in the rules, it would be found that "profit" really meant the acceleration of the time when the society would terminate, that is, when each member would receive his 100*l.*, and in this point of view the rules as to withdrawing members would benefit the mortgaging as well as the continuing members; so in the case of the sale of shares by auction mentioned in the ninth rule, there was nothing surprising in finding the term "purchase-money" used in reference to that dealing, for by those words was meant the 100*l.* minus a discount; the term "bonus" likewise had relation to the duration of the society, and meant so much as could be given to relieve members in respect of their payments; what was designated "interest or redemption money" was not, properly speaking, either one or the other, but it was an additional increasing monthly payment which those members who took out their shares, were to pay. Reading the seventh, eighth, ninth, and twelfth rules by this glossary, they became intelligible, and the plaintiff was clearly wrong in treating the sum paid to him as any thing else than a payment in advance of what he would otherwise have been entitled to at the end of the society. Members withdrawing were, under the rules, to be forgiven all after payments, but mortgaging members were not. The decree of the Vice-Chancellor was right. He referred also to the thirteenth and sixteenth rules.

*Hardy* replied.

THE LORD CHANCELLOR, (LORD CRANWORTH.) The question in this case is as to the terms on which the plaintiff is entitled to redeem certain property mortgaged to the defendants. The defendants are trustees of the Camberwell Building Society; the plaintiff is a member.

Building societies exist under the provisions of the act 6 and 7 Will. 4, c. 32, sections 1, 3, 4, 5; the principle is this, members subscribe monthly sums which are accumulated till the fund is sufficient to give a stipulated sum to each member, and then the whole is divided amongst them; in the society now in question the sum to be raised for each member is 100*l.* If this were all it would be a very simple transaction, mere accumulation, and the only question would be how to invest the sums subscribed to the greatest advantage. But

this is not all; one main object is to enable members to obtain their 100*l.* by anticipation, on their allowing a large discount. For this purpose, when a sufficient fund is in the hands of the treasurer, the members who desire to get their shares in advance bid, by a sort of auction, the sum which they are ready to allow as discount, and the highest bidder obtains the advance. Thus, if at the end of a year a sum of 500*l.* is in the hands of the treasurer arising from the monthly subscriptions, and the holder of ten shares is willing to allow a discount of fifty per cent., (no one offering more,) the 500*l.* is or may be advanced to him, being 50*l.* in satisfaction of each of his ten shares. For this accommodation he is bound to pay monthly, till a fund is raised sufficient to give 100*l.* per share to all the other members, not only the original monthly subscription but also a further monthly sum called redemption money. The statute provides that the shares shall not in any society exceed 150*l.* each; in this society, the shares are fixed by the rules, as I have already stated, at 100*l.* each. The amount of the monthly subscriptions and redemption money is fixed by the rules of each society; here the monthly subscription on each share is 8*s.* 6*d.*, the monthly redemption money, 3*s.* 6*d.*; so that the monthly payment by each member who has not received his share in advance is 8*s.* 6*d.*, by those who have been advanced it is 12*s.* If after such an advance as I have supposed no further advance were made, the natural course of the society would be that the members, other than the holder of the ten shares, would continue their monthly subscriptions, and the owner of the ten shares would continue his monthly subscriptions and redemption money, till the fund thus raised should be sufficient to pay 100*l.* per share to every member other than the holder of the ten satisfied shares. Thus, if there were one hundred shares, and at the end of the first year there was 500*l.* in hand, the condition of each shareholder before any advance made would be, that he would be bound to pay 8*s.* 6*d.* per month, say 5*l.* per annum, till, by means of these payments and the 500*l.* in hand, the requisite amount, that is, 10,000*l.* being 100*l.* for each 100*l.* share, should have been raised by accumulation. After the advance, the condition of every shareholder, other than the holder of the ten advanced shares, is, that he is to contribute his monthly payments till they, together with the monthly payments and redemption money contributed by the holder of the advanced shares, are sufficient to realize, not 10,000*l.* but 9,000*l.*, that is, 100*l.* for each share other than the ten shares of the advanced member whose shares will have been already satisfied by the 500*l.* He loses his interest in the 500*l.* advanced to the holder of the ten shares, but on the other hand the sum to be raised is only 9,000*l.* instead of 10,000*l.*, and the monthly contribution is increased by the amount of the redemption money paid by the member who has received his ten shares in advance. Further advances are made from time to time as funds are accumulated and as members are inclined to give high discount in order to obtain payment of their shares by anticipation. The gain to the society arises mainly from the high rate of discount which members in want of money are ready to give; in truth, the whole scheme is but an elab-

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borate contrivance for enabling persons having sums for which they have no immediate want to lend them to others at a very high rate of interest. In order to secure the due payment of the monthly subscriptions and redemption money by the members who have received their shares in advance, they are obliged to give satisfactory real security to the trustees of the society, and the statute protects such mortgages from the operation of the laws which until last session were in force against usury.

Besides this advance to a member of his share deducting discount, the rules provide also for the case of a member desiring to withdraw from the society altogether. By the sixteenth rule, any member may withdraw on certain terms there laid down, the principle being that he is to pay a small sum by way of fine or penalty if he withdraws at an early date after the formation of the society, but if he withdraws after having been a member, and so having paid his subscriptions, for several years, then on withdrawing he is to receive back the full amount of his subscriptions, and also, if the directors think fit, a further sum to be from time to time fixed by them by way of bonus out of what are called the profits of the society; this is provided for by the sixteenth rule, which is thus. (His lordship here read the rule as above set out.)

It is obvious that this is an arrangement which may, if the calculations be properly made, be carried into effect without injury to the society. When a member withdraws, the society thenceforth loses the benefit of his monthly subscriptions, but then they are relieved from the obligation of making up the 100*l.* to which he would eventually become entitled; if the member on withdrawing merely took back the amount of his subscriptions, the society would obviously benefit to the extent of the interest made by means of those subscriptions previously to the withdrawal. It is obvious that out of the interest so realized an allowance may be made to the withdrawing member, still leaving to the society some benefit from his past contributions. The sums subscribed by a member who withdraws have contributed to make up the fund out of which the shares of those members who have been advanced, that is, have taken a smaller sum at once allowing a large discount in lieu of the full sum of 100*l.* at a distant day, have been made good; they have therefore enabled the society to obtain a larger monthly payment, that is, 12*s.* instead of 8*s.* 6*d.* on each share, and to reduce on favorable terms the number of shares to be eventually provided for; this is in truth, substantially, an investment at a high rate of interest, and the benefits thereby accruing may not inaptly be designated, together with the interest on ordinary investments, by the name of profit. What is the precise amount of benefit, which from these different causes may have resulted to the society from the subscriptions of each member, must be a problem very difficult to solve, not, perhaps, admitting of any absolutely accurate solution; but it may be possible to arrive at it in a rough way, so at least as to enable the directors to fix from time to time a sum which may, without detriment to the interests of the society, be paid to any member desirous of withdrawing beyond the amount of

the principal sums subscribed by him ; and the sixteenth rule enables the directors to fix on such a sum, it being not I think inaccurately described as a bonus out of the profits of the society. The interests of members, as well those taking their shares by anticipation as those quitting the society, are thus tolerably well provided for.

But another case was contemplated, namely, that of members who, having received their shares by anticipation, might be desirous of relieving themselves from the burden of continuing the payment of their monthly subscriptions and redemption money. From the very nature of these societies, it is impossible to know with certainty how long it may be necessary to continue the monthly payments: they must be made until the sum necessary to give to every unadvanced member the full amount of his share, that is, in this society, 100*l.*, has been accumulated; the time required for this purpose will be more or less, according to the amount of benefit which the society may derive from the discount given on advances of shares and from the interest made by investments, in other words, as the profits realized have been large or small. Reasoning, *a priori*, the fair course would seem to be, that the society should ascertain as nearly as may be the period of time during which the monthly payments would have to be continued, and then should allow any advanced member to relieve himself from the obligation of continuing his monthly payments on paying down at once a sum equivalent to their present value. Thus, if the monthly payment is 12*s.*, and it is ascertained that these payments must probably continue to be made for ten years, it would seem to be a reasonable arrangement that the advanced member, who is liable to pay 12*s.* per month for ten years, should be freed from his liability on paying down at once a sum which an actuary should say is equivalent in present money to such continued prospective payment. This, however, is not the principle on which the power of redemption is given in this society; the provision on this subject is to be found in the fourteenth rule, it is as follows. (His lordship here read the rule as above set out.)

It is impossible to read this rule without being strongly impressed with the belief that those who framed it had not duly considered how it would operate. When an unadvanced member withdraws from the society, it is reasonable, and not necessarily inconsistent with the interest of its remaining members, that he should receive back, not only the principal sums which he has contributed, but also by way of bonus a portion of the benefits which those sums have gained for the society. Up to the time of his withdrawing he has received nothing; when he withdraws he loses all right to the share, that is, the 100*l.* to which, if he had not withdrawn, he would, like every continuing member, have been eventually entitled, and is content to take in lieu of it the amount of what for a series of years he has been paying, together with a portion of what has been as it were accumulating in respect of those payments towards the eventual realization of his 100*l.* share. This is the position in which a withdrawing member stands at the time of his withdrawal, but the condition of an advanced member redeeming, which is in truth withdrawing, is very different;

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he is not a member who has up to the time of his redeeming received nothing; in fact, he has received that which he was content to take, supposing redemption to be out of the question, as an equivalent for the whole of his share. The rule, therefore, which gives to him on redeeming his obligations the same sum under the name of profits as is given to the non-advanced member on withdrawing, appears to be hardly reasonable; still, the question to be decided is, not whether the provision is fair and just, but what is the meaning of the rule; if the meaning is clear, it is the duty of the court, if possible, to give it effect.

Having thus considered the principle on which building societies in general, and the Camberwell Society in particular, are constituted, I will now state the facts which give rise to the present claim. The plaintiff, being the holder of fifteen shares in the society, and so being entitled to receive at its termination fifteen sums of 100*l.* each, in the month of August, 1847, received five of his shares, or an equivalent for them, in advance, and on the 10th December following, he, in like manner, received in advance the equivalent for his remaining ten shares. The sum which he got in August, in respect of his five shares, was 272*l.* 10*s.*, and that which he got in December, in respect of his ten shares, was 544*l.* In order to secure the payment of his future subscriptions and redemption money, the plaintiff, on occasion of each advance, executed to the trustees of the society a mortgage of certain leasehold property which was considered by the surveyor a sufficient security; this was done in pursuance of the twelfth rule of the Society, which is as follows. (His lordship here read the rule as above set out.) Both mortgages are in the same form; that of the 10th December, 1847, as far as it is material to state it, is to this effect. (His lordship here stated the general purport of the deed.)<sup>1</sup>

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<sup>1</sup> The following abstract of the mortgage deed of the 10th December, 1847, is taken from 1 De. G. Mac. & G. p. 793; 15 Eng. Rep. p. 481: By indenture, dated the 10th December, 1847, and made between T. B. Fleming of the one part, and the then trustees of the society of the other part, after reciting the leases intended as a security, and the formation of the society, and after reciting that the sum of money to be contributed in respect of each share in the funds of the society amounted to 100*l.*, and that T. B. Fleming was entitled to receive out of the funds 1,000*l.* in respect of ten shares as described and numbered in the books of the society, and that, for the security of all payments to become due in respect of the said shares, he had agreed to execute the assurance thereby made; it was witnessed, that T. B. Fleming, in consideration of 544*l.* to him paid by the trustees, assigned to them the leasehold premises in Manor-road therein described, to hold them, their executors, administrators, or assigns, for the residue of the terms by the leases granted, upon trust from time to time so long as T. B. Fleming, his executors, administrators, or assigns, should duly make the several payments and observe and perform the regulations prescribed in the articles of the society in respect of the said shares, and also perform all the covenants therein contained to be made, observed, and performed, to permit him or them to hold the said premises and receive the rents thereof for his and their benefit; but if he or they should at any time thereafter fail to perform and keep all or any of the said covenants, or should neglect or refuse for the space of six calendar months, to pay, observe, and perform, all or any of the subscription payments or redemption money and regulations on his or their parts to be paid, observed, and performed, then upon trust to appoint a person to collect the rents; but should the rents be insufficient to satisfy the purposes

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The claim of the plaintiff, filed on the 19th December, 1853, states these two mortgages, and then states a resolution passed by the directors at one of their meetings duly held on the 16th November, 1848. (His lordship here read the resolution as above set out.) The society appears by its rules to have commenced on the 6th November, 1843, so that the eleven years referred to in that resolution would end on the 6th November, 1854. The claim then proceeds to state that the directors, by their annual report issued in November, 1852, awarded 12*l.* 10*s.*, per share to each member withdrawing; this was done in pursuance of the 16th rule, to which I have already referred. On the 7th March, 1853, the plaintiff gave notice to the directors that he was desirous of redeeming, paying, and satisfying the two securities which he had given in August and December, 1847; this notice was given under the fourteenth rule of the society, which is as follows. (His lordship here read the rule as above set out.) On the 2d May, 1853, the directors, by a resolution, raised the amount of bonus payable to a withdrawing member to 25*l.* per share, and at a subsequent meeting, held on the 5th September, 1853, they further raised it to 32*l.* per share. The plaintiff by his claim, stating these facts, prays to be at liberty to redeem on the terms of being allowed the same amount of profits as, according to the resolutions of the directors, is payable to members withdrawing. The material facts were verified by affidavit; and the case was heard by Vice-Chancellor Wood early in the present year. That very learned and able judge came to the conclusion that the plaintiff was wrong in setting up any claim to a share of profits, and that he could only redeem on paying down at once what would become payable by him under the society's rules, calculating by an actuary what would be its probable duration. (His lordship here stated the Vice-Chancellor's order in the terms above set out.) From that order the plaintiff appealed to me, and I heard the appeal argued at considerable length shortly before the long vacation.

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aforesaid, then upon trust to sell as therein mentioned, and out of the rents and the money arising from the sale first to retain certain costs as therein mentioned, and in the next place to retain all such principal money, subscriptions, or other payments as should have been advanced to or should be due by T. B. Fleming, his executors, administrators, and assigns, in respect of the said shares, it being agreed by the parties thereto that in case such sale should take place, all moneys which would at any time afterwards become due from him or them according to the rules of the society should be considered as then immediately due, and the same or so much thereof as might be lawfully demanded should be deducted out of the moneys received under the aforesaid powers, and to pay the residue of the said moneys unto the said T. B. Fleming, his executors, administrators, or assigns; and it was thereby declared that the deed should not be a security for a greater sum than 544*l.* The indenture contained covenants by T. B. Fleming to complete the message, to pay the subscriptions and interest payable on his shares according to the rules of the society on the days and in manner therein mentioned, and abide by and perform the rules thereof in respect of the said shares; that it should be lawful for the trustees, &c., after default should be made in the several subscriptions, interest, or other payments thereinbefore made payable, or in observing the rules of the said society, to enter into the said premises and receive the rents; for further assurance, and to insure from damage by fire.

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Vice-Chancellor Wood, who gave to the consideration of this case the greatest attention, came to the conclusion that it could not have been intended to give any thing on account of profits to an advanced member redeeming his mortgage; and he points out what extraordinary and even absurd results must or may follow from adopting the plaintiff's construction of the rules. At the time of the argument I was strongly inclined to take the same view of the case as had been taken below; but I have, since that time, had frequent opportunities of considering the subject, and I have, after much reflection, come to the conclusion that, whatever doubt I may entertain as to whether the framers of the fourteenth rule fully understood its operation, still, the rule itself is unambiguous; it states, expressly, that the member redeeming is to be entitled to deduct from the sum secured by the mortgage the same proportion of profits as is allowed to a withdrawing member. Taking my duty to be merely that of construing this rule, it appears to me that the rule itself admits of no doubt; and I may add further, that, to hold an advanced member in this society not entitled to this deduction, might work injustice. Who can say how far the existence of this rule may have influenced an advanced member in the amount he agreed to give as a consideration for the advance? It is plain that a member might, without imprudence, give a much larger discount for his 100*l.*, when he knew he had this rule to fall back upon, than if no such rule existed. For instance, suppose there were no such rule, and that a member at the end of the first year were desirous of taking his share in advance; the tenth rule stipulates that at least 40 per cent. must be given for the advance of a share at the end of the first year; the member would, therefore, have to consider whether it would be prudent for him to offer a discount of at least forty per cent.; if he did so, he would receive 60*l.*, having paid during the first year 5*l.*, so that in truth he might be considered as getting an advance of 55*l.*; for that he would have to pay during the continuance of the society, say for ten years longer, a monthly sum of 12*s.*, that is, an annual sum of 7*l.* 4*s.* He might not think it prudent to make such an offer, if the provision of the fourteenth rule did not exist; but with that provision, knowing that he could at any time put himself in the condition of an unadvanced withdrawing member, he might well offer forty, or even fifty, sixty, or seventy per cent. for the advance of 100*l.*

The case may be considered, first, as it would have stood if it rested on the mortgages only, secondly, as it is affected by the rules. First, then, let us consider the object and effect of the mortgages. (His Lordship here again referred to the terms of the mortgage deeds.) The property comprised in the mortgage is thus pledged to the society as a security for the due payment by the plaintiff of all sums of money which under the rules he, as owner of ten shares, may become liable to pay, and upon the default the mortgagees, who are trustees for the society, may enter on the mortgaged property, and receive the rents, and, if the rents prove insufficient to satisfy what the plaintiff is bound to pay, may, after a certain lapse of time and notice, sell and retain out of the proceeds all sums which would

at any time afterwards become due from the plaintiff by virtue of the rules, treating such sums as all then immediately payable, and having thus satisfied themselves the full amount of their demand, they are to hand over the surplus to the plaintiff. It will be observed that the sum thus secured to the society is of uncertain amount, a monthly payment to endure for an uncertain period, that is, till thereby and by means of other subscriptions and payments a certain number of shares of 100*l.* each shall have been accumulated. Now, generally speaking, a security of this nature is not redeemable. Where a mortgage is made to secure an annuity for the life of another, or to indemnify against contingent charges, or for any other object not capable of immediate pecuniary valuation, redemption is impossible; a security can only be redeemed where the party redeeming is able to do the thing intended to be secured; and where the thing secured is the payment of an annual or a monthly sum during an uncertain period, no one can say how long the payments will continue, and it is therefore impossible for the party who has given the security to redeem it by an immediate payment of a fixed sum. Here, the object of the deed was to secure certain monthly payments by the plaintiff, till by means thereof and of the monthly subscriptions of the other members a certain sum should be raised; if the plaintiff should make a default in any of these payments, the trustees to whom the mortgage is made are empowered to receive the rents, and so to satisfy the society what the plaintiff ought to have paid; if the rents should be insufficient for the purpose, then, but not otherwise, the trustees are authorized to sell. The plaintiff, however, does not suggest that the rents are insufficient, and I cannot assume that to be the case, and taking the rents to be sufficient, the plaintiff certainly can have no right under the terms of the deed alone to compel the trustees to sell, and take a present payment in lieu of the continuing security which they would have by receipt of the rents; he cannot deprive the society of the continuing right to receive and apply the rents so long as his obligations to the society remain in force.

The question then arises, secondly, how far are the rights of the parties varied by the rules of the society. That the plaintiff is entitled under the fourteenth rule to redeem, seems to admit of no doubt. The object of the rule clearly was, to give to any member who had taken his share in advance, and so had become liable to certain payments so long as the society should endure, the right to free himself from those liabilities by paying at once a gross sum of money. The question is, on what term she can exercise that right, or, in other words, what is the true construction of this rule, for it is on that rule alone that his right to redeem depends. The plaintiff contends that, in taking the account against him, he is to have credit for the same proportion of the profits per share as the holder of an unadvanced share would have been entitled to on withdrawing; and I confess, with all deference to the opinion of the Vice-Chancellor, who thought differently, I think that the plaintiff is right. That by the taking of the account on this footing great inconveniences and even

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absurdities may follow, cannot be denied; they are forcibly pointed out and insisted on by the Vice-Chancellor in his judgment; still, the question is not as to the policy or reasonableness of the rule, but as to its true meaning. Now as a mere question of construction, the rule, I own, does not seem to me to admit of doubt, the language is quite distinct; the directors are to award the redeeming member the same proportion of profits per share as is allowed on the withdrawal of unpurchased shares. This may, perhaps, lead to very absurd consequences, and to results which the framers of the rule never contemplated; still, the plaintiff has a right to say that this is the contract which he entered into. In offering a high discount for his share, he may have been influenced by the advantages which this provision held out to him, and if so, it is no sufficient answer to him to say that the consequences of the rule were not contemplated by those who framed it. He has a right, when the meaning of the rule is once ascertained, to insist on its being strictly adhered to, and I have already stated that the language used can hardly be said to admit of doubt. I therefore have come to the conclusion, contrary to the view taken by the Vice-Chancellor, that the plaintiff is entitled to credit for the same share of profits as at the time of the notice given by him would under the sixteenth rule have been allowed to a member withdrawing.

But then another not unimportant question arises on the other side of the account. The plaintiff is, in my judgment, entitled to credit for these profits; but with what sum is he to be charged on the debit side of the account? The Vice-Chancellor, by his order, directs a calculation to be made as to the probable duration of the society, and charges the plaintiff with the amount of the payments he would have to make during such probable duration; but on what principle is his liability thus restricted? The security which he has given will be in force, if unredeemed, until the society ceases to exist; what right has this court to compel the holders of the security to accept in lieu of its benefits, something different from that which they have contracted for? The security gives them rights which will exist as long as the society shall actually endure; the actual duration of the society may extend over a period longer than its probable duration. In making, therefore, the probable duration of the society the measure of the plaintiff's liability, it is clear that the court will, or at all events may, be giving to the society something different from that which they would have been entitled to under their deed. It is clear this cannot be done, unless it is authorized by the terms of rule fourteen, which gives the power of redeeming. Now the sum with which, according to that rule, the plaintiff is made chargeable, is the full amount expressed to be secured in and by the mortgage; that is to say, all the sums which, according to the rules of the society, the plaintiff would be bound to pay if there were no redemption. How is the amount of these sums to be ascertained? The fourteenth rule, by authorizing the redemption of such a mortgage, clearly contemplated the possibility of ascertaining it; and I can see no other way of doing so, without the risk of dealing

unjustly by the mortgagees, except by charging the mortgagor with all the payments he may have to make, assuming the society to endure for the longest period during which, in the nature of things, it can endure. When it is ascertained what number of 100*l.* shares still remain to be provided for, there can be no insuperable difficulty in making out at what time, assuming no more members to be advanced and none to withdraw, the requisite sum must have been raised by means of any assets actually in the hands of the treasurer, and of the monthly payments to be made by the members. When that period is ascertained, it will be easy to calculate what are the payments which, during its subsistence, the plaintiff will be bound to make in respect of his monthly subscriptions and redemption money, and with that sum he must be charged as with a sum presently due from him. Against that, he is, I think, entitled to credit for the same bonus out of profits, as would, according to the rules of the society and the resolutions of the directors, be payable to withdrawing members.

I am aware that in the case of *Mosley v. Baker*, 6 Hare, 87, referred to in the argument, Sir James Wigram, on a bill to redeem filed by a member who, having been advanced his shares, had given a mortgage to secure a payment of his future monthly subscriptions and redemption money, as in this case, decreed a redemption without allowing the plaintiff mortgagor any thing on account of profits, and on the terms of limiting his liability to the payments he would have to make during the probable duration of the society; and the Vice-Chancellor, in the present case, relied on that decision, which was affirmed by Lord Cottenham, on appeal. If the two cases had been similar, I should probably have felt bound by such an authority; there are, however, several material distinctions. In the first place, as to profits, no question could there arise, for, by the sixty-fifth rule of the society then in question, no share of profit was to be allowed to a withdrawing member until after the expiration of four years from the formation of the society; that society was established in September, 1844, and the bill to redeem was filed in May, 1847, so that, in no possible view of the case, could the plaintiff be entitled to any claim in respect of profits: and, secondly, as to the period during which the plaintiff's liability to contribute was to be treated as enduring, the mortgage expressly stipulated that in case the mortgagees should exercise their power of sale, they should, out of the proceeds, retain the full amount thereafter to become due from the mortgagor, calculating the probable duration of the association; the mortgagees did exercise their power of sale, and the decree gave to both parties, mortgagor and mortgagees, the precise benefits for which they had bargained. Assuming, therefore, this provision in the mortgage deed to have been not inconsistent with the rules of the society, as to which I express no opinion, the decree was perfectly right; but, for the reasons to which I have adverted, it does not seem to me to govern this case, where profits were payable to withdrawing members, and where the power of sale had not been exercised,

nor, on its being exercised, was there the provision as to calculating the probable duration of the society.

The result, therefore, is, that the order of Vice-Chancellor Wood must be varied, by substituting, for the direction to calculate the probable duration of the society, a direction to ascertain the longest period during which the society may possibly last, having regard to its net assets and to the amount of monthly subscriptions and redemption money still continuing payable, and to the number of 100*l.* shares to be provided for, and by declaring that the plaintiff is to be charged with all subscriptions and redemption money which will become due and payable by him, assuming the society to endure for the whole of that period, such money to be treated as a debt presently due from him. There must, then, be a declaration that against that charge the plaintiff is entitled to credit for 12*l.* 10*s.* on each share, being the amount of bonus payable to withdrawing members at the time when the plaintiff gave his notice. The decree of the Vice-Chancellor gave the defendants their costs, adding them to the money secured, and this was a matter of course in the view which his Honor took of the rights of the parties; but in altering the decree, as I am doing, I necessarily put an end to the mortgagees' right to the costs of the suit, for they have refused to allow redemption at all on the terms to which the plaintiff was I think entitled, of giving him the share of profits which he claimed; on the other hand, the plaintiff did not offer the terms to which I think the defendants were entitled; the result, therefore, is that nothing must be said about costs. With these variations the decree of Vice-Chancellor Wood will stand as it is.

I must not omit to mention what was pressed by the defendants' counsel, namely, that the court has in this case no jurisdiction, that the question ought to have been decided by arbitration. The argument on this head was put thus: the fourth section of the 6 & 7 Will. 4, c. 32, enacts that all the provisions of the Friendly Society Act, 10 Geo. IV. c. 56, so far as the same might be applicable, should apply to any benefit building society, as if they were there re-enacted; the twenty-seventh section of the Friendly Society Act, 10 Geo. IV. c. 56, makes provision for settling disputes by arbitration; the clause is as follows. (His lordship here read the section,) and the thirtieth rule of the society has reference to this subject. (His lordship here read the rule as above set out,) and it was contended against the present claim of Mr. Fleming, that he had no right to call the trustees to account by proceeding in this court, but that his sole remedy was by a reference to arbitration. To this, however, I cannot agree. The question to be decided depends partly on the construction of the rules, and partly on the true meaning of the mortgage deed, and the mode of giving to it its true effect. Admitting, for the sake of argument, that this court would have no jurisdiction in a dispute depending solely on the construction of the rules, there are still points for decision here, arising on the nature and extent of the relief to be given on the mortgages, which this court alone can determine. The total

absence of adequate machinery for enabling arbitrators to enforce any award they might make on the mortgage in a case like the present, affords cogent evidence that the dispute is not within their competency. *Cutbill v. Kingdom*, 1 Exch. Rep. 494, referred to in the argument, strongly suggests this view of the case. I may further remark that neither Sir James Wigram nor Lord Cottenham, in the case of *Mosley v. Baker*, nor Lord Truro in the case of *Seagrave v. Pope*, 1 De G. Mac. & G. 783, s. c. *Exg.* Rep. 477, seem to have had any doubt as to their jurisdiction. The point, indeed, was not, so far as I am aware, raised in argument before them; still, I cannot but think that these cases must be treated as authorities on this subject of no inconsiderable weight. It is difficult to suppose that the want of jurisdiction, if there was such a want, should have escaped the observation of judges and counsel in all these cases. I consider it clear that the court has jurisdiction, and I have only adverted to the point that it may not be supposed the objection had been forgotten.

The case was spoken to on minutes in reference to the direction to ascertain the duration of the society, and as to costs. The following is the substance of the order thereupon made for the purpose of carrying out the judgment of the Lord Chancellor:—

That so much of the order made by Vice-Chancellor Wood, on the 21st April, 1854, as directed that, "in taking the account, the probable duration of the society according to the rules and regulations is to be calculated, and all money which (having regard to such probable duration) might at any time hereafter become due from the plaintiff is to be considered as due at the time of taking the said account," be discharged; and instead thereof, that in the said account, the longest period during which the society might at the time when the plaintiff gave his notice possibly last, having regard to its net assets and to the amount of monthly subscriptions and redemption money then continuing payable, and to the number of shares in the society then to be provided for be ascertained; that the plaintiff be charged with all subscriptions and redemption money which would become due and payable by him, assuming the society to endure for the whole of that period, such money to be treated as a debt presently due from him; and that against that charge the plaintiff be entitled to credit for twelve pounds ten shillings on each share, being the amount of bonus payable to withdrawing members at the time when the plaintiff gave his notice; that so much more of the said order as ordered it to be referred to the Taxing Master to tax the defendants their costs of the suit, be varied by limiting the costs of the defendants to be so taxed to the costs of the defendants subsequent to the date of the present order; that in case of the plaintiff redeeming the mortgages of the defendants, there should be no order as to costs on either side up to the date of the present order; that in taking the account directed by the order of Vice-Chancellor Wood, of the 21st April, 1854, and in making the certificate in pursuance thereof, regard be had to the present order; that in all other respects, except

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so far as might be inconsistent with the present order, the order of Vice-Chancellor Wood, of the 21st April, 1854, be affirmed.<sup>1</sup>

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<sup>1</sup> MOSLEY v. BAKER.

December 11, 1848, and January 30, 1849.

Terms on which a member of a building society is entitled to redeem premises mortgaged by him to the society on receiving an advance of money in respect of his shares.

This was an appeal from a decision of Vice-Chancellor Wigram; a full report of the case, as heard by his Honor, will be found in the 6th volume of Mr. Hare's Reports, page 87. The appeal was argued before the Lord Chancellor, Lord Cottenham, previously to the commencement of the series of reports by Messrs. Macnaghten and Gordon.

*Rolt and Prior* were for the plaintiff, the appellant.

The *Solicitor-General*, (Sir John Romilly,) and *Beavan*, were for the trustees of the society.

January 30, 1849. The LORD CHANCELLOR, (LORD COTTENHAM.) The decree directs a redemption, which is not objected to by the defendants. There is not in the mortgage deed any provision for a redemption; the terms, therefore, upon which it ought to take place are to be collected from other parts of the deed, and I have no doubt of the correctness of the Vice-Chancellor Wigram's construction of it. The error of the plaintiff seems to arise from a supposition that the mortgage was to secure to the company the sum advanced to him, but such is not the case; the sum advanced was only in anticipation of the calculated value of his share at the winding up of the affairs of the company, and the mortgage was to secure the payments which the company had stipulated for as the consideration for such shares, constituting the fund out of which the estimated value of such shares was ultimately to be paid. The recitals and the provisions of the deed are not capable of any other construction; but that part which is most applicable to the present, the provision for selling the shares, is the most conclusive; for, contemplating the event of the plaintiff not making the stipulated monthly and other payments, it gives to the company a power of selling his shares, the proceeds of which they are to retain in satisfaction of all such subscriptions and other payments as shall be then or shall thereafter become due and owing and payable in respect of such shares, calculating the probable duration of the said association; it being agreed that, in case such sale shall take place, all moneys which shall at any time afterwards become due in respect of the said shares shall be considered as due at the time of such sale, and that the same shall be fully deducted and paid out of the moneys received, and that the amount shall be calculated accordingly. It is obvious that, there not being any stipulated terms for a redemption, the plaintiff cannot be entitled to redeem upon terms less beneficial to the association than those stipulated for in the power reserved to them of selling, and of which they are deprived by the decree for redemption. These, therefore, are the terms binding upon the parties, and of their construction there cannot be any doubt. But then it is said that such terms are a departure from the rules and regulations of the association; to this there are two answers, first, that there is no such departure, and secondly, if there were, that the deed alone constitutes the contract between the parties upon which the plaintiff rests his case, not seeking to have it altered or reformed. This excludes the necessity of inquiring into the first objection; but I cannot but observe that I have not been able to discover any such departure in the deed from the provisions of the rules and regulations as has been suggested. The thirty-seventh rule provides for the monthly payment, and the fifty-ninth for further payment until the objects of the association shall have been fully accomplished, and the power allowing members who have not received the anticipated value of their shares to withdraw, excludes from any such power those

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GOODWIN v. FIELDING.

April 28 and 30, and May 2 and 9, 1853.

*Vendor and Purchaser — Specific Performance — Want of Advice — Statute of Frauds.*

The executrix of a lessee agreed to sell to A, the residue of her term (except a day) and the fixtures on the premises for 400*l*. This agreement was entered into by the executrix without advice, and there was no written memorandum of it except a letter written by the executrix to her own solicitor a few hours afterwards. Subsequently the landlord, knowing that there had been a negotiation, if not an agreement, between the executrix and A, agreed with her for the purchase of the residue of the term for 550*l*. A, on hearing of this, offered the executrix, if she would complete her contract with him, 1,000*l*. as purchase-money, and indemnity against any proceedings on the part of the landlord. She accepted the offer, and demised the premises to A, for the whole term wanting a day:—

*Held*, 1. That the original agreement (if any) with A, was such in its nature and circumstances as not to be of any validity in equity, unless the price was shown to be equal or more than equal to the value of the property.

2. That as this was not shown, the landlord was entitled to a specific performance of his agreement, not only against the executrix but against A.

*Quere*, whether the letter to the solicitor was a sufficient memorandum in writing within the meaning of the statute of frauds.

THESE were two appeals from a decree of Vice-Chancellor Stuart, directing the specific performance of an agreement under the following circumstances, as appearing upon the affidavits in support of and in opposition to a motion for a decree.

By an indenture of lease dated the 19th of August, 1842, the plain-

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who have, and who have executed a mortgage. In the forty-eighth rule, the security to be given is described as a security for the future payments in respect of such share or shares. The fifty-eighth rule is inaccurate and obscure; it relates to the power of sale to be inserted in the mortgage, and not to redemption; and it provides that upon a sale the association shall retain all such principal subscriptions and other payments as shall be then due, owing, and payable under and by virtue of such rules and mortgage. Now the money advanced is not due or repayable by the party receiving it, but the subscriptions are payable during the continuance of the association, and the security to be taken is to secure such payments; subscriptions "then due" cannot mean subscriptions actually become due in point of time; for if so, the shareholder, having received the whole estimated value of his shares, would be entitled to have his property restored to him, deducting only such subscriptions the time for paying which had actually arrived. The sixty-second rule, which is directly applicable to the present case, as it relates to the redemption of property in mortgage, is quite conclusive; for it provides that, upon redemption, the shareholder shall have the amount of his share of profits and subscription paid deducted from the full amount expressed to be secured in and by such mortgage; but the forty-eighth rule describes the security to be given as a security for the future payments in respect of such share or shares, and not for the money advanced. I am, therefore, of opinion that the mortgage deed, if that were involved in this case, does not depart from the rules and regulations, and that the principle of the decree is right, and that the future payments are to be taken at the full value, and that the direction as to costs is correct. The appeal must be dismissed, with costs.

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tiff demised to James Fielding (since deceased) the Beulah Spa hotel, at Norwood, with the appurtenances, for twenty-one years; and by another indenture of lease, dated the 31st of August, 1846, the plaintiff demised to James Fielding a cottage and land adjoining, with the appurtenances, from the 24th of June, 1846, for the term of sixteen years thence next ensuing.

James Fielding died on the 3d of March, 1851, having by his will, dated the 3d of February, 1849, bequeathed to his wife, the defendant, Eliza Anne Fielding, all his leasehold premises at Norwood during her life or widowhood, with power, in her discretion, to sell and dispose of all and every, or any of the same; and he appointed her sole executrix of his will, which she proved on the 20th of June, 1851.

About the middle of July, 1852, negotiations were entered into between Mrs. Fielding and James Franks, (another defendant,) who was the owner of land adjoining the demised premises, for the purchase by him of the Beulah Spa hotel. In the course of those negotiations, Mr. Franks called on Mrs. Fielding at the hotel, and she then told him that she would soon be ready to treat with him.

On the 10th of August, 1852, a Mrs. Ritchie, who was a relative of Mr. Franks's wife, and was staying with Mrs. Fielding at the hotel, sent for Mr. Franks, by Mrs. Fielding's request, with a view to a treaty for the sale of the lease. He accordingly, on that day, called on Mrs. Fielding at the hotel, and had an interview there with her in the presence of his wife and Mrs. Ritchie. Mrs. Fielding then stated to him, in the presence of his wife and Mrs. Ritchie, that she could not assign the lease of the premises, because there was an express clause in it prohibiting her from so doing, but that she could give him an underlease. She then said: "Well, Mr. Franks, I am now quite in a position to offer you the place. I am a woman of business, and shall say what I have to say in few words." Mrs. Fielding then asked him 800*l.* for the underlease, good-will, and licenses and premises. Mr. Franks replied: "Why do you ask more than was named before, when you last talked with me respecting it?" "Well," she said, "what will you give me, Mr. Franks?" He replied: "I would give what was named before, namely, 300*l.*" Mrs. Fielding then said she hoped Mr. Franks would give her more, and that if he would give her 400*l.* she would immediately consult with her family, and let him know the result in half an hour. On his agreeing to this, Mrs. Fielding quitted the room. In about half an hour she returned, and told him that he should have the premises. She also observed: "Now you quite understand that I cannot assign the lease, but I can grant an underlease," to which Mr. Franks assented. Some further conversation then ensued between Mrs. Fielding and Mr. Franks as to the time when possession should be given to him of the premises, and she said she thought he could not have it in the September quarter, but that he could depend on it at the half-quarter between Michaelmas and Christmas.

After the terms of the arrangement had been thus settled between Mrs. Fielding and Mr. Franks, Mrs. Fielding informed him that Mr. Cornthwaite, of the Old Jewry, was her solicitor; that she had known

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him many years, and would give Mr. Franks his address, in order that he might call upon Mr. Cornthwaite. She also said that she was writing to Mr. Cornthwaite herself upon the matter, so that he might get forward with the necessary documents. At the conclusion of the interview she said: "Now, if you should like to renew our lease, I recommend you to write to Mr. Goodwin, the landlord, or I will do it for you."

On the 11th of August, 1852, Mrs. Fielding wrote, signed, and sent to Mr. Cornthwaite the following letter:—

"Norwood, August 11, 1852.

"Dear Sir: Last night I settled with Mr. Franks, and fear I have not done so well as I ought, having agreed to give him the lease, fixtures of the house, stoves, garden boxes, seats, and marquee, for 400*l*. He has engaged to paint and thoroughly repair. The rain has prevented my coming into the city to-day, but I will, if possible, to-morrow. Perhaps Mr. Franks may call on you before I see you, and he is so dreadfully sharp to deal with that I thought it best to give you this information. Of course, he knows nothing about the mortgage, which I must pay, therefore there is no occasion to mention it."

On the 12th of August, 1852, Mr. Franks called on Mr. Cornthwaite at his offices in the Old Jewry, and had some conversation with him respecting the agreement with Mrs. Fielding.

On the evening of the 12th of August, 1852, Mr. Franks again called on Mrs. Fielding, who asked him whether he had seen Mr. Cornthwaite, and whether every thing was right; to which Mr. Franks replied that he had seen Mr. Cornthwaite, and that all was settled, or to that effect.

A few days afterwards, Mr. Franks called on Mr. Cornthwaite again, and arranged with him that, as his solicitor was out of town, Mr. Cornthwaite should act as his solicitor in the business. A draft of the proposed underlease from Mrs. Fielding to Mr. Franks was shortly afterwards prepared by Mr. Cornthwaite.

On the 11th of August, 1852, Mr. Franks wrote and sent a letter to the plaintiff, informing him that Mrs. Fielding had assigned to Mr. Franks all her interest in the hereditaments and premises.

The plaintiff, by his affidavit, deposed that he was much surprised at the statement contained in the letter from Mr. Franks. He thereupon entered into a correspondence with Mrs. Fielding, to ascertain from her what had actually passed between her and Mr. Franks, and, in the course of such correspondence, the plaintiff reminded Mrs. Fielding that, by her lease, she could not assign the premises without the plaintiff's permission in writing.

On the 3d of September the plaintiff sent to Mrs. Fielding the following letter:—

"Hampton Court, September 2.

"Dear Madam: Mr. Franks wrote to me before I left town, to say he had settled with you for the remainder of your lease, or rather he had taken it off your hands, and that he wished to see me. Since, I

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have been applied to by a stranger, to know if I would let him a renewal of the lease, provided he could make his terms with you.

"I shall be in London on Saturday morning, and will meet Mr. Franks there, at any place he should appoint, if you have come to an arrangement with him; but be so good as to send me a reply to this by return of post, as I am going on Saturday morning for a few days into Essex, and then at the end of the week I go to Scarborough, to join my family there, and may not be back for three weeks; but, as far as I am concerned, I care not for any haste in the matter.

"Faithfully yours,

"W. J. GOODWIN."

On the 3d of September, Mrs. Fielding wrote to the plaintiff in reply to his letter, and informed him (having been instructed so to do by Mr. Franks) that Mr. Franks would be at his place of business, 14 Little Tower Street, on the following day between the hours of eleven and two. The plaintiff, however, did not go there.

On the 24th of September, the plaintiff sent to Mrs. Fielding the following letter:—

"Hampton Court, 23d.

"Dear Madam: I have just received a letter from Mr. Franks, and I request you will be so good as to inform me if you have signed a written agreement with him, and, if so, what the nature of it may be.

"I intend going to town in the morning, and shall be at the Burlington hotel, Cork Street, at twelve o'clock, where you can either see me or send to me. I really hope for your own sake that you have not placed yourself in the unenviable position that Mr. Franks would have me believe.

"Yours truly,

"W. J. GOODWIN.

"I shall be away from home for ten days after Sunday next."

On the 24th of September, Mrs. Fielding met the plaintiff at the Burlington hotel, in company with her then intended son-in-law, who was a barrister. Mrs. Fielding, on that occasion, denied that she had signed any agreement with Mr. Franks. Whether she denied having entered into any agreement with him, or said that all negotiations between her and Mr. Franks were at an end, was the subject of conflicting testimony. Mrs. Fielding deposed that she then informed the plaintiff of the agreement made between her and Mr. Franks on Tuesday the 10th of August, and that the plaintiff inquired what sum Mr. Franks had offered to give; and that, on Mrs. Fielding's replying 400*l.*, the plaintiff said he supposed she would be contented if he could get her 450*l.* or 500*l.* for her interest in the premises. Mrs. Fielding also deposed that, on the 8th of October, a Mr. Wm. Thompson, a surveyor, called, stating that he did so by the direction of the plaintiff, and examined the state of the repairs of the Beulah Spa hotel; that he, after this examination, said they were in a state of great dilapidation, and told Mrs. Fielding that the plaintiff might

eject her for breach of covenant to keep in repair. That he asked Mrs. Fielding what she wanted for the lease, and that she said 600*l*. That, being alarmed at what was said by Mr. Thompson as to the plaintiff's power to eject her, she, on the 9th of October, went to her solicitors, and requested them to examine the covenants in the lease as to repairs, which Mr. Cornthwaite did, and informed her that the lease contained a positive covenant to keep in repair, for the breach of which the plaintiff might eject her without any compensation. That on the 27th of October, Mr. Thompson, by the direction of the plaintiff, but not by Mrs. Fielding's direction, or with her authority, attended at the Beulah Spa hotel, with an agreement in duplicate ready engrossed, blanks being only left for the sum to be paid by the plaintiff, the penalty for breach of agreement, and the dates of signing and for giving possession. That Mr. Thompson filled up the blank, left for the purchase-money in the agreement so engrossed, by inserting the sum of 550*l*.

By this memorandum of agreement, which was dated the 27th of October, 1852, and was expressed to be made between Mrs. Fielding of the one part and the plaintiff of the other part, Mrs. Fielding agreed to sell to the plaintiff, for the sum of 550*l*., the messuages, tenements, hereditaments, and premises comprised in both the leases, with the appurtenances thereto belonging, for all the residue of the terms for which Mrs. Fielding held the same (being ten years unexpired from midsummer day then last) at the yearly rent of 185*l*., and subject to the covenants in the leases of the said hereditaments contained, and also to sell to the plaintiff the good-will of the trade carried on in the Beulah Spa hotel; and also, by good and effectual assurances in the law, to assign the same and to deliver up possession, except such parts thereof as were underlet, to the plaintiff, or whom he might appoint, on or before the 2d of December then next, and to pay and clear up or make an allowance for all rents, taxes, rates, assessments, and gas rate due or accruing due for or in respect of the premises, to the day of giving possession, and to make good or allow for all external damaged windows; and also to sell to the plaintiff all the furniture, fixtures, and effects that then were in and upon the said premises mentioned in an inventory signed by Mrs. Fielding, together with all trade, furniture, fixtures, and utensils which were not mentioned in the inventory, but then were on the said premises, at the sum of 300*l*.; and also to sell to the plaintiff all her good and salable stock in trade; (not exceeding the quantities and at the prices therein mentioned;) and also to assign to the plaintiff, or to whom he should appoint, at the time aforesaid, the beer and other licenses for the hotel, and then and afterwards to do all such other acts and things as might be necessary in order to obtain a legal protection, and the transfer of such licenses to the plaintiff, or whom he might appoint.

A draft assignment was then prepared by the plaintiff's solicitors and sent to the solicitors of Mrs. Fielding, and was on or about the 7th of December, 1852, finally returned to the solicitors of the plain-

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tiff, approved by Messrs. Cornthwaite and Wilson on behalf of Mrs. Fielding. It was afterwards engrossed.

Mr. Franks deposed that having heard of the negotiations between the plaintiff and Mrs. Fielding, he consulted his solicitors, who advised him that, in consequence of his not having obtained a written agreement signed by Mrs. Fielding, he would have great difficulty in compelling the performance by her of the agreement, and being afraid that she would forthwith surrender the premises to the plaintiff, and that he should thereby be deprived of the benefit of his agreement with her, he agreed to give Mrs. Fielding 1,000*l.* for the lease, and to give her a bond of indemnity against any proceedings on the part of the plaintiff, if she would perform her agreement with Mr. Franks.

Accordingly, on the 16th of December, 1852, Mrs. Fielding executed to Mr. Franks an underlease of the hotel and premises, and delivered to him the fixtures, furniture, and the licenses connected with the hotel, but the stock in trade and liquors of Mrs. Fielding, on the premises, were not purchased by him.

On the previous day the plaintiff's solicitors had attended at the Beulah Spa hotel, at Norwood, with the engrossment of the assignment to the plaintiff for her execution, but found that she was from home.

On the 20th of December, the plaintiff filed the bill in the present suit, which, after stating such of the above facts as related to his agreement with Mrs. Fielding, stated that the plaintiff, acting upon that agreement, and relying on the good faith of Mrs. Fielding, and on her positive assurances that all negotiations between her and Mr. Franks were at an end, did, on the 3d of November, 1852, enter into an agreement with Thomas Masters, another defendant, whereby in consideration of 1,250*l.*, the plaintiff agreed to grant a lease of the premises to Mr. Masters, and the trade and good-will thereof for twenty-five years from Christmas day then next at the yearly rent of 200*l.*, and subject to the covenants in such lease to be contained, and to deliver up to Mr. Masters the possession of the premises (except such parts thereof as were underlet) on or before the 2d of December then next. The bill further stated that Mr. Masters, in pursuance and part performance of the lastly-mentioned agreement, had paid to the plaintiff the sum of 200*l.* in part of the purchase-money, and insisted on his right under his agreement, and on having it specifically performed by the plaintiff.

The bill also stated that Mr. Franks had, on many occasions by himself or his agents, been informed by the plaintiff or his agents of the existence of the agreement of the 27th of October, and also of the agreement with Mr. Masters, and had admitted the validity thereof and offered to pay to the plaintiff and Mr. Masters a considerable sum of money for the purchase of their rights and interests under the agreements. The prayer was for a specific performance of the agreement of the 27th of October against Mrs. Fielding and Mr. Franks, and that the underlease to the latter might be declared void and delivered up to be cancelled.

By the plaintiff's affidavit in support of the motion for a decree, he

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deposed that, shortly after the memorandum of agreement of the 27th of October, 1852, had been signed by Mrs. Fielding, full information of the agreement and of the nature and contents thereof was given by the plaintiff or his solicitor or agent to Mrs. Franks, and that on the 3d of November following the plaintiff received the following letter from Mr. Franks :—

“ 14 Little Tower Street, London,  
November 2, 1852.

“ Dear Sir: You said in your last communication that you were not then prepared to treat with me for the Beulah Spa hotel, &c. Knowing that you have now the whole matter entirely at your disposal, I shall feel much obliged by your letting me have the first offer. I think I shall be disposed to treat with with you on better terms than any one else, and should much prefer taking it of you. I make this communication to you without prejudicing my claim against Mrs. Fielding, which is in the hands of Messrs. Daws and Sons, who are eminent lawyers, and who state that I have without doubt a good case against her. But I hope that satisfactory arrangements may be made with you.

“ I remain,

“ Yours faithfully,

“ JAMES FRANKS.”

The decree appealed from ordered that the agreement of the 27th of October, 1852, should be specifically performed and carried into effect. It declared that the underlease dated the 16th of December, 1852, was void, and ordered that the same should be set aside; and that the defendants, Mrs. Fielding and Mrs. Franks, should within seven days after the service of that order upon them, respectively surrender unto the plaintiff the hereditaments and premises comprised in and agreed to be assigned by the memorandum of agreement of the 27th of October, 1852, such surrender to be settled by the conveying counsel of the court in rotation, in case the parties differed about the same. And it was thereby ordered that the plaintiff should be let into possession of the Beulah Spa hotel and the other hereditaments and premises comprised in the agreement of the 27th of October, 1852, and also into possession of the goods, chattels, and effects in and about the hereditaments and premises included in the agreement within seven days after the service of that order on the defendants, Mrs. Fielding and Mr. Franks. And the plaintiff was to pay Mr. Masters's cost, and was to be paid his own costs, and those which he should pay Masters, by the defendants, Mrs. Fielding and Mr. Franks.

From the whole of this decree the defendants, Mr. Franks and Mrs. Fielding, appealed separately.

*Daniel and Bristowe*, for the plaintiff.

There was really no concluded agreement between Mrs. Fielding and Mr. Franks. Even if there had been any such agreement, there

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was no sufficient memorandum of it in writing, for Mrs. Fielding's letter to her own solicitor was not such a memorandum.

[KNIGHT BRUCE, L. J. Does the statute require the memorandum to be addressed to any person in particular? Does it require more than "a memorandum or note in writing?" ]

Still, her solicitor was not then Mr. Frank's solicitor, and the memorandum was in the same position as if it remained in her own desk. There is no instance of a person being bound by such a communication. Moreover, that alleged agreement differs entirely in its terms from the underlease to Mr. Franks, which cannot therefore be held to be a performance of it.

They referred to *Holland v. Eyre*, 2 Sim. & St. 194; Sugden on Vendors and Purchasers, p. 150; *Kennedy v. Lee*, 3 Mer. 441; *Owen v. Thomas*, 3 Myl. & K. 353; *Morgan v. Holford*, 1 S. & G. 101; *Potter v. Sanders*, 6 Hare, 1.

*Malins* and *Lewis* supported the appeal of Mrs. Fielding, and submitted that, as an executrix, she could not properly accept 550*l.* when by Mr. Franks's offer the property appeared worth 1,000*l.*

*Bacon* and *Druce*, in support of the appeal of Mr. Franks, contended that, at all events, there was no equity against him. He had only accepted from Mrs. Fielding the performance by her of an agreement which was anterior to her agreement with the plaintiff. They cited *Dawson v. Ellis*, 1 Jac. & W. 524; see also *Fuller v. Bennett*, 2 Hare, 394; *Courtney v. Williams*, 3 Hare, 539; *Higgins v. Scott*, 2 B. & Ad. 413; *Smith v. Watson*, Bunbury, 55.

*Daniel* replied.

*Judgment reserved.*

May 9. KNIGHT BRUCE, L. J. I consider the first question in this case to be whether, upon the supposition that Mrs. Fielding had not entered into any binding agreement respecting the property in dispute previously to the agreement of October, that agreement is one of which the specific performance ought to be enforced at the instance of the plaintiff. And this question can only, I think, be answered in the affirmative, unless the 550*l.* on that occasion contracted for, was not then a fair and sufficient price for the property, sold as it was by Mrs. Fielding in the character of a trustee. My impression, however, is in favor of the fairness and sufficiency of the price of 550*l.*, which, indeed, upon the evidence, there is no other ground for disputing than the increased price afterwards obtained from Mr. Franks, namely, 1,000*l.* The motives, however, and circumstances under which he submitted to pay that sum are sufficient to prevent it from being a criterion of value; and though perhaps Mrs. Fielding would have been wrong if, previously to the agreement of October, she had made no endeavor at dealing with her neighbor, she is not open to the charge, for she had tried him and found him not willing to give more

than 400*l.*; not willing, indeed, to give so much; for, though he had consented to that amount, it was after a struggle. It seems to me that Mrs. Fielding was uniformly desirous to get as much as she could, and that when she closed with Mr. Goodwin she thought, and had solid grounds for thinking, 400*l.* the utmost sum she could make of Mr. Franks. It was therefore in my opinion clearly not incumbent on her to apply to him again, or to give him notice before contracting with Mr. Goodwin. The price of 550*l.*, let it be remembered, was only for the leasehold property, independently of fixture, of furniture, of utensils, and of stock, while for so much of those particulars as the additional 300*l.* covered, I see not the least reason to suppose that price too small. On the whole, I conceive that not any person interested under the will of Mr. Fielding is or ever was entitled to complain of the contract of October, or to be dissatisfied with it on account of the price or otherwise, notwithstanding that, after it, and with the knowledge of it, Mr. Franks prevailed with himself to offer, and Mrs. Fielding with herself to accept, the 1,000*l.* which he is said to have parted with; my conviction being that she never would have obtained from him more than the 400*l.* if she had not, after bringing him so far, made a contract for an equal or a larger amount with some one else. I think that it would be wrong and mischievous to create or encourage such a notion as that a trustee for sale may avoid a fair and an unobjectionable contract by entering into a subsequent contract for a higher price. The consideration of 550*l.* must stand or fall by its own merits, not by the result of any comparison with the 1,000*l.*, and is in my judgment maintainable.

But all that I have hitherto said is, I repeat, on the supposition that, before the agreement of October, a contract binding on Mrs. Fielding, binding her in equity, I mean in her character of trustee under her husband's will, had not been made by her with Mr. Franks. And how does that matter stand? The agreement or alleged agreement of August, and the title of Mr. Franks under it, have upon the part of the plaintiff been assailed with more or less success or plausibility, on various grounds, of which I mean to give an opinion upon none, except in connection with a point raised against and not by the plaintiff. For the difference between the considerations to which a contract by a trustee for sale is liable, and those applicable to a contract by a vendor absolutely entitled for his own benefit to the produce of what he agrees to sell, was brought under the attention of the Vice-Chancellor and of ourselves by the plaintiff's adversaries, or one of them. Mrs. Fielding was not solely interested in the produce of the property in controversy. She was a trustee for sale, but had no adviser in the transaction of August. The persons present at the bargain of the 10th (if that expression should be used) were herself single-handed, and Mr. Franks, accompanied by two ladies of his family. It was not a business-like transaction. Nor was there any record, note, or memorandum of it, unless so far (if at all) as Mrs. Fielding's letter of the following day to her solicitor can be so called. I assume that letter to be well in evidence against the plaintiff. I assume that it prevents all resort to the Statute of Frauds. I do not forget that

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she wrote it, apart probably from Mr. Franks, when very possibly nine or ten hours or more had passed subsequently to the interview of the 10th, and she had had time to reflect; still, without intending any imputation upon Mr. Franks, I must say that neither the agreement, if any, of the 10th, nor the letter of the 11th, nor the transaction compounded of the two, was, in my opinion, such in nature and circumstances as to be of any validity in equity against the testator's estate, otherwise at least than upon the condition of the price being equal or more than equal to the value.

The 400*l.*, however, was not merely the price of the leasehold property. It extended also to other matters, namely, stoves, garden boxes, a marquee, seats, and fixtures. But independently of the personal chattels included, the evidence leads, in my judgment, unavoidably to the inference that, before and upon and continually after the 10th of August, the leasehold property alone, for which on that day, as Mr. Franks and Mrs. Fielding now say, he agreed to give and she to accept 400*l.*, or so much of that amount as ought to be referred to the leasehold property, was worth considerably more than 400*l.*, was worth, that is to say above 500*l.*, upon a just and reasonable estimate, without taking into account the pressure to which Mr. Franks (from the particular convenience to him of the property) was capable of being subjected; a process, thought by so many persons to be perfectly consistent with their duty towards their neighbor, that, in moderation, it would perhaps be righteous over much to blame, or not indeed rather to expect it, in a trustee.

My opinion accordingly is, that if, after the month of September, there had been no dealing of any kind between Mrs. Fielding and the plaintiff, or between Mrs. Fielding and Mr. Franks, and he had, without any want of diligence, filed a bill against her for a specific performance of the agreement of August, submitting to take either an assignment or an underlease of the leasehold property, and proved in the suit, all the documents and facts which are established by the evidence in this cause, (so far as possible consistently with the assumed absence of the dealings after September with Mr. Goodwin and Mr. Franks respectively,) the suit would have failed, and justly failed, if opposed by her upon the case which she had to adduce against it.

For these reasons, without entering more at large into the matter, I think the Vice-Chancellor's decree substantially right. It will be as well in point of form to vary it as to the declaration of Mr. Franks's deed being void, and as to setting it aside. This no doubt the Vice-Chancellor himself would have done if asked. Mrs. Fielding must pay the plaintiff the costs of her appeal, not so I think Mr. Franks of his.

TURNER, L. J., after stating the facts of the case, said that as regarded Mrs. Fielding, the defence was that the agreement was made under circumstances involving surprise and undervalue, but that no sufficient proof of undervalue was before the court, for the subsequent contract with Mr. Franks afforded no proof of undervalue under the circumstances of the case. If it were held to do so, every trustee

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might defeat an agreement by a subsequent one for a higher amount. In support of Mr. Franks's appeal, Mrs. Fielding's letter to her solicitor had been relied upon. Assuming that the letter was a sufficient memorandum in writing, it did not prove such an agreement as this court would enforce against a trustee. His lordship doubted whether it contained a sufficient description of the property, for there were two leases, and the letter did not specify to which it referred. In the next place, the letter contained these passages: "I fear I have not done so well as I ought;" and, (speaking of Mr. Franks,) "He is so dreadfully sharp to deal with, that I thought it best to give you this information." It might well be doubted whether such a memorandum could be enforced against a trustee, even assuming it to be sufficient to satisfy the provisions of the Statute of Frauds. But, independently of these considerations, the evidence proved that the agreement with Mr. Franks was entered into in such circumstances, and that the price agreed to be paid was such that the court never would have enforced the specific performance of that agreement. There was, moreover, Mr. Franks's own letter of the 2d of December, speaking of the plaintiff as having the property entirely in his power.

*The alteration in the decree suggested by Lord Justice Knight Bruce was made, and Mrs. Fielding's appeal was dismissed with costs, Mr. Franks's appeal without costs.*

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SIMPSON v. CHAPMAN.

June 22 and 23, 1853.

*Executor of Partner — Good-will of Share in Bank.*

A testator was a member of a partnership at will in a bank, without any provision entitling the executor of a deceased partner to an interest in the good-will of the concern. The credit, in which the bank was, rendered capital unnecessary, and at the testator's death the property of the concern exceeded its liabilities by a very small amount, the testator's share in which was far exceeded by the balance due from him to the bank on his private account, as a customer. After his death, the surviving partners admitted into the firm his son, who was his executor, but who was not admitted into the firm in that character, and the business continued to be carried on without any separation or appropriation of the partnership assets as they existed at the testator's death. In a suit against the executor for the administration of the testator's estate :—

*Held*, that he was not accountable to the testator's estate for the profits which he had received as a partner in the bank.

THESE were two appeals from a portion of a decree of Vice-Chancellor Stuart, in a suit for administering the assets of a testator, named Thomas Simpson, who for some years previously to, and at the time of his death, carried on the business of a banker at Whitby, in copartnership with John Chapman, one of the defendants, and Abel Chapman, under the firm of Simpson, Chapman, and Co. The

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name. The executor could not retain that one third which he had made by the use of documents which ought not to have been used at all, and which really were of no value. These are the grounds on which we say that, as between the testator's estate and the executor, the plaintiff is entitled to have accounted for as part of the estate at least such profits as have arisen from the testator's credit on notes and liabilities of the partnership and from the interest of the debts due to the partnership in the testator's lifetime. But if it is impossible to ascertain how much profit has been introduced from these sources, then the executor is not entitled to the benefit of his own default, and of the inaccurate mode of keeping his accounts, but the testator's estate must be entitled to the whole benefit. The defendants, by their answer, say it is utterly impossible to make the distinction. They say: "How much of the cash of the banking house at the time of the testator's death was employed in paying the partnership debts, how much was employed in making advances and interest to other persons, we know not; we have no document to show how many notes were issued after his death. We have no means of telling." In fact, the allegation is generally that the accounts have been kept in such a way that it is impossible to make any distinction of that sort whatever.

[TURNER, L. J. Has the rule ever been adopted of charging partners on the same principle on which an executor is charged? His lordship referred to *Wedderburn v. Wedderburn*, 4 Myl. & Cr. 41.]

In that case, there were other partners, all of whom received the profits jointly, whether executors or not; but there, the share of the profits, which we say belonged to the testator's estate, was received by an executor alone, and by an executor who was not a partner of the testator in his lifetime, but who came in after the testator's death, and took not merely the good-will of the business, which possibly the surviving partners might have given him, but also that which they have not the power to give him, namely, a portion of the testator's property in the concern.

KNIGHT BRUCE, L. J. The appeals in this case relate only to a small portion of the decree, to these words, namely: "An inquiry whether the defendant, Henry Simpson, ever brought any capital into the banking business in the pleadings mentioned, except the assets of the said testator; and the court declares that, in taking the accounts hereinbefore directed, the defendants, John Chapman and Henry Simpson, are to be charged in respect of the profits of the said bank from the death of the testator, paid or carried to the credit of the defendant, Henry Simpson, so far as such profits have accrued from the assets of the said testator employed in the banking partnership."

This passage, it is contended by the plaintiff, should be extended and made more adverse to the other appellants, who, on their part, insist that it should be wholly omitted, and that nothing should be substituted for it.

It is in the first place to be born in mind that the plaintiff has so

constructed his suit as to preclude him from obtaining a partnership account in the cause, for which the absence from the record of Mr. Abel Chapman, (who never was a party,) and the circumstance that his estate is not represented before us, are alone a sufficient reason, if there were no other ground. That omission is not through any wish or neglect on the part of any of the defendants.

The question whether the case is brought within the principles on which *Crawshay v. Collins*, 15 Ves. 218; 1 Jac. & W. 267, and other authorities of that class proceeded, may be a very different question.

To the proper consideration, however, of this latter point, it is essential that we should determine whether the partnership formed between Mr. Abel Chapman, the defendant Mr. John Chapman, and the defendant Mr. Henry Simpson, owed its origin or had reference to Mr. Henry Simpson's character of one of the testator's executors. And the evidence, I think, renders it necessary to decide this particular question against the plaintiff; nor was it, I conceive, as one of the residuary legatees that Mr. Henry Simpson became a partner.

I collect that he became a partner as he did, merely and simply on his own account. Still, he may have employed or concurred in employing assets of his father in the business in such a manner as to constitute or amount to a breach of trust. Is it established that he did? In my opinion not. The partnership of which the testator was a member ended at his death. His partners were entitled not to close the business upon the happening of that event,—were entitled to act thenceforth as bankers in partnership together on their own account, without or with any fresh partner.

The bulk, the chief part, of the capital belonging, at the testator's death, to the partnership of which he was a member, consisted of debts due to it from various customers, and from its London agents, and the cash in the banking-house at Whitby, for the supply of its daily purposes in the ordinary way, including notes of the partnership, payable to bearer on demand, intended for circulation, and used as cash; while, on the other hand, it owed at that time, in the way of business, debts, to such an amount as that, in truth, though each of the partners was probably then a wealthy man, and very deservedly in good credit, the partnership itself was insolvent; that is to say, the debts due from it exceeded its assets at that time. This, however, is on the footing of treating as not existing, or as a bad debt, a sum of 14,000*l.* or 15,000*l.* due at the testator's death from him on his private account to the partnership. Treating that as paid after his death, by his private estate, his executors would in that character have to receive back part, but not the greater part of it. The greater part would belong to his two partners, who, (as the surviving partners,) being liable personally for the debts due from the dissolved partnership, were entitled to apply its assets towards the discharge of those debts. Doubtless the debts on each side, or many of them, were, after as well as before the testator's death, in a state of continual or frequent fluctuation; customers paying in money and drawing out money, borrowing at interest, and depositing at interest, diminishing or paying off loans, withdrawing or diminishing deposits. The build-

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ing and offices where the business was carried on formed part of the testator's real estate, and was devised by him to the defendant, Henry Simpson.

Such a state of things, without more special circumstances than I see here, seems to me an insufficient ground for the direction and declaration that these appeals relate to; particularly where, as in the present instance, there has been considerable delay in bringing forward the claim. With the knowledge that the plaintiff must have had, it was incumbent on him to make the demand earlier, even had his case not been so slender and shadowy as it is. Something was said of the common bank notes of the dissolved firm having been reissued by the new firm after the testator's death. This, however, I cannot hold to be material for any present purpose. The ordinary accounts of the testator's personal estate the plaintiff is entitled to and has obtained. He will have, if he has not had, his due share of its clear residue, not subjected to any amount or proportion of debt which it ought not to bear. No part of the bill has been or now is dismissed. But I am, I repeat, for omitting the disputed words, and substituting nothing for them.

It appears to me, that our order should be made on both petitions of appeal, that the plaintiff should pay the costs of his, and that the other appellants should take back their deposit.

TURNER, L. J. This case involves, or may involve, questions of very great importance; questions as to what is to be considered as capital of an outgoing partner with reference to a banking concern, in a case in which, in the ordinary sense of the word "capital," there was in truth no capital at all. It is not necessary, as it appears to me, to give a decision on any of these questions, and certainly they are not questions into which the court would be inclined unnecessarily to enter.

There are two appeals in the present case; one presented by the plaintiff, complaining in substance of that part of the decree which gives him only the profits of the bank, from the death of the testator, so far as such profits have accrued from the assets of the testator employed in the banking partnership, the plaintiff insisting that he is entitled to an unqualified account of the profits derived from the bank, so far as they have been received by the testator's executors. The other appeal is by the defendants, the executors insisting that all the inquiries relating to the profits of the bank ought to be struck out of the decree.

The first question which it appears to me to be material to consider is, whether the plaintiff can succeed in his appeal, claiming the right to all the profits of the bank, without reference to the qualification which is introduced into this decree, "so far as such profits have accrued from the assets of the testator employed in the banking partnership." The object of the plaintiff, of course, is to charge Henry Simpson, the executor of the testator, with the whole amount of the one third of the profits of this banking business received by him from the year 1843, when the testator died, down to the present time. To

give the plaintiff that relief, would be to assume that all the profits which have been received by Henry Simpson are profits derived from the testator's capital, and in my opinion it is impossible, under the circumstances of this case, for the court to make any such assumption. The business here carried on is the business of the bank. The capital with which the plaintiff contends that business to have been carried on consists of money deposited with the firm in which the testator was a partner. But from the nature of the banking business, these moneys must, in the period from the death of the testator to the present time, have been from time to time turned over. The old loans which have been made by old customers with the old firm, must, from the nature of the banking business, have been paid off, and new deposits and new loans made by the customers to the new firm in which Henry Simpson was a partner. From the nature of the business, therefore, it is impossible, I think, to arrive at the assumption that all the profits which have been derived by this bank from the death of the testator down to the present time, were derived from the capital of the testator. Consequently, I think that the plaintiff cannot succeed in his appeal, which claims the whole of those profits.

I desire on the present occasion to express very distinctly my entire concurrence in the opinion expressed by Vice-Chancellor Wigram in the case of *Willett v. Blandford*, 1 Hare, 253, in which he has made, I think, a most correct and masterly summary of the principles by which the court is to be guided in cases of this description. He says, *Ibid.* 272, that the profits derived from the trade carried on after the death of the testator must depend upon the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, and the conduct of the parties after his death. That all these may materially affect the rights of the parties. I fully adopt this view, and, applying it to the present case, I venture to say that it depends on the nature of this trade, on the capital employed from time to time in it, on the conduct of the parties, on the extent of the skill and industry of each partner employed in the concern, to what extent the profits derived from the trade ought to be attributed to the capital, and to what extent they ought to be attributed to other sources; and that, under the circumstances of this case, it would be going much too far to hold that the plaintiff ought to succeed in the claim which he makes for the whole of the profits derived from the testator's third of this concern. My opinion therefore is, that the plaintiff's appeal must be dismissed, with costs.

We come, then, to the question, how, if the plaintiff cannot succeed in his appeal, is this decree to be worked? The court declares "that in taking the accounts hereinbefore directed, the defendants, John Chapman and Henry Simpson, are to be charged in respect of the profits of the bank from the death of the testator, paid or carried to the credit of the defendant Henry Simpson, so far as such profits have accrued from the assets of the said testator;" but the decree contains no direction and no declaration by which it can be ascer-

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tained how far the profits are to be considered as having accrued from the assets of the testator. That is a question left wholly at large. The decree, therefore, in its present state, could not be worked. We must consider, however, whether the declaration complained of on both sides is a proper one to be contained in this decree? The first observation which has occurred to me upon that subject is this: The partnership of which the testator was a member determined upon his death on the 26th of May, 1843. The business was carried on from that time, not as a continuance of the old partnership, but on a new agreement entered into between the surviving partners and Henry Simpson, the new partner; Henry Simpson standing in the character of executor, but entering into the partnership not in that character, but on his own separate and individual account. There is here a complete agreement on which, from the year 1843 down to the present time, these parties, including Abel Chapman, who is not represented on this record, have been carrying on their banking business; and this bill contains no materials for setting aside the agreement which has been entered into between these parties as entered into by them in fraud of the testator's estate. I mean "in fraud," of course not in the moral sense, but in the sense of "contrary to the rights of the testator's estate." Whether the agreement was contrary to those rights so as to effect Abel Chapman, I do not say; but at all events it appears that the existing partnership has been carried on upon a new agreement, which this bill does not seek to disturb; and I do not well see how the declaration can stand, when the bill does not seek to impeach or disturb the agreement on which the partnership has in fact been carried on.

If, however, the bill had sought to disturb that agreement, what is the ground on which a residuary legatee of a deceased partner is entitled to claim profits derived from his share? That right is founded on a breach of trust in the executor and in the partners, in continuing the trade with the capital which the testator had in the concern at the time of his death. But, how is this court, in the absence of Abel Chapman, to declare that there has been a breach of trust on the part of the executors and on the part of Abel Chapman in entering into this new agreement, and carrying on this business? If there was a breach of trust on the part of the executors, there was equally a breach of trust on the part of Abel Chapman, for which all must be responsible. He may say: "I never was a partner with the executors of this testator; I became a partner with Henry Simpson in his separate and individual character." And is this court to determine that, as between the executors of the testator and the legatees of the testator, the partnership was carried on with the testator's assets, when, if the question comes to be tried between Abel Chapman and the executors of the testator in a suit for the purpose of winding up the partnership, Abel Chapman may be able to show that he in truth never did become a partner with the testator's executors, and never did in fact employ any part of the capital of the testator in carrying on the business?

There is another, and, as it appears to me, by no means an unim-

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portant question to be considered before a decree can be made on this part of the case. The plaintiff's claim is founded, as I have already observed, on a breach of trust. If the legatees have a right to complain of that breach of trust, is not that a right which must be enforced by winding up the concern and putting an end to the breach of trust? Is a breach of trust to be continued under the sanction of this court by a continuing account? All the cases which I remember upon that subject have been cases where the legatees have come against the executors and against the surviving partners, complaining that the two parties have employed the assets of the testator in carrying on the concern, and praying that those assets may be taken out of the concern. This bill seeks no such relief.

I am quite satisfied on all these grounds that the inquiry directed by this decree in reference to these points ought not to have been contained in it. It was urged by Mr. Prior, that Henry Simpson, having received profits of the business, and being unable to distinguish how much of them was attributable to the character of executor and how much belonged to him in his individual character, must be charged with the whole. I believe, however, that that principle has never yet been applied to a case of this description where the executor has not been carrying on the trade as executor, but in his own separate and individual right, conceiving that he was entitled so to carry it on.

On these grounds, my opinion concurs with that of my learned brother, that the reference with regard to the ninth inquiry, and the declaration consequent upon it, must be omitted.

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CLOSE v. CLOSE.

July 11, 1853.

*Principal and Surety — Indemnity — Composition Deed.*

A necessary consequence of a reservation in a composition deed of a creditor's remedies against a surety is the continuance of the surety's right to be indemnified by the principal debtor, and this right will not be held to be abandoned unless a contract to abandon it is proved. Therefore, where one of the creditors who acceded to a composition deed was also a residuary legatee of a surety for the compounding debtors to another creditor, and one of the compounding debtors happened to be the surety's executor: —

*Held*, that the residuary legatee's accession must be taken to have been in respect of his direct debt only, and did not preclude him from insisting on the surety's estate being indemnified by the debtors.

THIS was an appeal from the decision of Vice-Chancellor Stuart, who, on exceptions to the report of the Master, held the respondent entitled to credit as executor of the testator in the cause for a sum of 1,196*l.* 16*s.* 7*d.*, claimed by the respondent in his discharge.

In September, 1833, John Close the younger, and James Close the

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defendant, (who were sons of the testator, and carried on business in partnership as merchants at Manchester and Naples,) borrowed 5,000*l.* of Mr. Henry Gaskell; and in order to secure the repayment thereof, they, on the 30th of September, 1833, by arrangement with the testator, drew and delivered to the testator their three several promissory notes for 1,000*l.* each, payable to the testator at the respective dates of one, two, and three years. The testator in pursuance of the arrangement, and at the request of John Close the younger, and the defendant, and as their surety, indorsed the three promissory notes to Mr. Gaskell, and joined John Close the younger, and the defendant, as their surety in a bond to Mr. Gaskell, for securing payment to him of the balance of the loan of 5,000*l.* The testator died in December, 1833, having, by his will, dated the 4th of July, 1833, bequeathed his residuary personal estate to the defendant and another trustee and executor, (who did not accept the trusts,) upon trusts for realization and investment, and payment of an annuity to the testator's sister, for her life, and subject thereto, upon trust, to pay the income to the testator's wife for her life, and from and after her decease to stand possessed of the capital in trust for such of the testator's three sons, Thomas, the plaintiff, John, (since deceased,) and James, the defendant, as should be then living, and the lawful issue of such of them as should be dead, leaving lawful issue. John Close the younger and the defendant were, independently of the above transaction, considerably indebted to the testator's estate, and were also indebted to the plaintiff. In February, 1836, they fell into difficulties. James, the defendant, was then at Naples in a bad state of health. John and the plaintiff entered into negotiations with the creditors, and a correspondence took place between John and the plaintiff, in the course of which the plaintiff wrote letters to John containing the following passages:—

"18th of February, 1836.

"The mischief is now done; you have stopped; your credit is ruined; the creditors are certainly entitled to the full payment of their claims if your assets be sufficient; but if they be not, when you have given up all, you are entitled to your release. Suppose you pay 18*s.* in the pound, (and your dividing half that sum depends upon the strenuous and devoted exertions of yourself and James,) in equity and justice you will be entitled to your full discharge."

"February 22, 1836.

"To bring the matter to a point, do you think the creditors would agree to 15*s.* in the pound, payment in six months, and guaranteed by Gaskell and myself? Of course, I shall come in with the other creditors, and Gaskell the same; if Mr. Jackson and Mr. Birley concur with me, you had better have an agreement on paper, embodying the terms, immediately drawn up."

"February 22, 1836.

"These are my opinions. I think a composition of 15*s.* in the pound, in full of all claims, (every creditor giving up any contingent

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security he may possess to the advantage of the estate,) an equitable arrangement as regards both creditors and debtors. I believe that there will remain some surplus to you and James after this composition is completed, otherwise I would neither give security nor sacrifice 500*l.* to 600*l.* for the advantage of the creditors. I am sure that 15*s.* is the highest composition that you can afford to pay under the most favorable circumstances. Mr. Cursham tells me it is too much."

"February 28, 1836.

"The point at issue between me and Gaskell, divested of all surplusage, is, that he wishes to secure more than 15*s.* in the pound, and to effect this by means most repugnant to my feelings; viz: by coming upon my poor mother's property. You may be sure that I shall never consent to this preference over me. However, I think I may now safely inform Mr. Gaskell that the principle of 15*s.* in the pound will not be objected to; and the only question that remains is to ask to what extent he will be a party to the guarantee. I should not be justified in asking more than 3,000*l.* after I have voluntarily given up 500*l.* to 600*l.* for the benefit of the estate."

*March* 10, 1836, John thus wrote to Mr. Gaskell, and (as the defendant alleged) by the plaintiff's desire: "One circumstance has struck my brother Tom and myself as difficult to arrange, which is the obtaining the consent of the executor of my late father. You will remember my brother James is the only acting executor. Your experience may suggest some means of obviating this difficulty."

On the 10th of March, 1836, Mr. Gaskell replied as follows: "I should think you may safely undertake for your brother's assent as executor of your father. Your mother, brothers, and yourself are the only parties interested in any surplus there may be after payment of debts, and you and they may now assent; and I should think an undertaking from you and your brother Thomas, that James will execute the composition deed when sent out, will be satisfactory. I, as creditor to the estate, shall consent to the executor acceding to the composition."

A composition was thereupon prepared and executed by several of the creditors, but not by the plaintiff or defendant, or John Close the younger. It was, however, the common case of both sides, that all parties had acceded to the terms of this deed. It was dated the 21st of March, 1836, and purported to be made between John Close the younger and the defendant as copartners of the first part, the defendant as the sole executor of the testator of the second part, the plaintiff of the third part, Henry Gaskell of the fourth part, and the creditors of John Close the younger and the defendant of the fifth part. It recited, amongst other things, that John Close the younger and the defendant were indebted to the several creditors in the several amounts thereunder written and scheduled; (which John Close the younger and the defendant were unable to pay;) and were also indebted to the plaintiff in the sum of 2,125*l.*, and were also indebted to the defendant James Close, himself, as the executor of the testator in the sum of

2,167*l.* 16*s.*, and were also indebted to Henry Gaskell in the sum of 5,039*l.* 3*s.* 6*d.*; (which debts John Close the younger and the defendant were unable to pay;) and it was expressed to be thereby agreed that a composition of 15*s.* in the pound upon the scheduled debts, and upon the debts so due to the plaintiff and Henry Gaskell as aforesaid, should be paid by John Close the younger and the defendant, and should be (with one immaterial exception) guaranteed as to the last instalment thereof by the plaintiff as therein mentioned; but reserving to Henry Gaskell all liens and other collateral securities for his aforesaid debt.

The instalments payable under the deed were paid by John Close the younger and the defendant, and accepted by the creditors, including Mr. Gaskell, who, after receiving the composition of 15*s.* in the pound, claimed and received from the defendant, as executor of the testator, the other 5*s.* in the pound upon his debt.

John Close the younger died a bachelor in May, 1842, from which time the defendant had carried on the business of the late firm of "John and James Close," upon his own sole account.

On the 31st of March, 1849, Mary Close, the widow of the testator, died intestate, whereupon the plaintiff claimed to be entitled to one moiety of the testator's residuary estate, and applied to the defendant for an account. The defendant accordingly rendered an account, in which he claimed credit for the amount paid to Mr. Gaskell over and above the composition dividend. The plaintiff objected to allow this, on the ground that the defendant was bound to indemnify the father's estate from it. The plaintiff then instituted the present suit for an account, and under the ordinary reference, directed by the original decree, the Master allowed to the defendant the item objected to, and this allowance was, on exceptions, confirmed by the Vice-Chancellor.

*Bacon and H. Prendergast*, in support of the appeal, cited *Payler v. Homersham*, 4 *Man. & Sel.* 423.

*Roll, Follet, and Kinglake*, for the defendant.

The surety's estate was a party to this composition, through the concurrence of the defendant, as executor of the testator, and the plaintiff, as residuary legatee. By their concurrence in the composition the debt was extinguished to all intents and purposes. The provisions of the deed, therefore, are sufficient to support the decisions of the Master and Vice-Chancellor, and it would have been a fraud on the creditors for the plaintiff to have reserved a right to a further payment from either of the debtors. But if there was any doubt as to the intention of the parties, the correspondence clearly shows that the plaintiff abandoned all claim against the defendant and his partner, except under the deed.

They referred to *Owen v. Homan*, 3 *Mac. & G.* 378; *s. c.* 3 *Eng. Rep.* 112.

KNIGHT BRUCE, L. J. The question here, between the plaintiff, a

residuary legatee, and the defendant, the executor of the late Mr. John Close, is, whether the plaintiff contracted with the defendant that the personal estate of the deceased should, as between the plaintiff and the defendant, be either the sole or the first fund for discharging a certain portion of a debt which was due to Mr. Henry Gaskell from the deceased as a surety for the defendant, and against which, therefore, independently of any such contract, he was bound to indemnify the deceased and his estate. The defendant, holding the affirmative, puts his case on a deed, which is in evidence, and on some letters, also in evidence.

I will first, independently of the letters, consider the deed alone, which was one of composition between the defendant and all or a considerable number of his creditors; (a large body in the whole;) one of these was the deceased, in respect of a demand altogether different and distinct from Mr. Gaskell's debt—the estate of the deceased having been, I repeat, then represented by the defendant himself as executor. Another creditor was the plaintiff in his own right, independently of the will; another was Mr. Gaskell. Upon these debts, the arrangement, in which they all concurred, was, that the defendant should pay 15s. in the pound in full discharge of them, except that Mr. Gaskell, as to the remaining 5s. in the pound of his debt, expressly reserved his rights against the estate of the deceased. Those rights he afterwards exercised; and the defendant claims in his accounts with the estate, as between him and the plaintiff, to be allowed what the defendant has so paid to Mr. Gaskell out of it, although the deceased, as has been stated, was only a surety to Mr. Gaskell for the defendant himself, who asserts this claim to be well founded, because, as he says, the meaning and effect of the terms of composition and arrangement that I have mentioned were so. But I have been unable to see any ground for the proposition. Certainly, the deed does not contain expressly any such contract, nor is it a consequence following, or to be gathered from the express agreement that I have specified—an agreement with which it was consistent that the defendant should continue liable to indemnify the estate of the deceased from Mr. Gaskell's demand. The deed, taken alone, does not, I conceive, support the defendant's claim.

With regard to the letters, I am not sure that, in this controversy, they ought to be looked at, my impression being that no document but the deed can, for any present purpose, be regarded. But if the letters ought to be taken into consideration, they appear to me to make no difference, those before the deed not amounting to more, according to my understanding of them, than treaty or negotiation, though forming a correspondence which one would not have been at all surprised to find ending in a contract such as the defendant imputes to the plaintiff; but I see no evidence that they did so end; and, as to the letters after the deed, they seem to me either to have nothing to do with the matter of the exceptions, or at least to contain no contract. There is no case for reforming or altering the deed, by addition or otherwise; and, acceding to the Master's view, I think that the de-

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fendant's materials of every kind fail him upon the point of the exceptions.

I have not forgotten, though I have not mentioned, the connection of John Close the younger with the matters that have been under discussion. It makes no difference. Dying, as he did, in his mother's lifetime, he lost, upon that event happening, all title to participate in the residue of his father's estate.

TURNER, L. J. Perhaps the parties may have had the intention which has been imputed to them; but I am perfectly satisfied that, upon the construction of this deed, which, in my opinion, can alone be looked at, it is impossible to spell out such a contract as has been contended for.

The simple case is this: John and James Close, who carried on business in partnership, were indebted to Mr. Henry Gaskell in above 5,000*l*. The estate of the testator, the father of John and James, was surety to Mr. Gaskell for the debt. John and James being unable to discharge their liabilities, a composition was agreed upon, upon the terms expressed in a deed to which James was a party, in his character of executor of the testator. According to these terms, John and James were to pay Gaskell 15*s*. in the pound, in full satisfaction and discharge of the debt due to him; and, so far as John and James personally were concerned, their liability to Mr. Gaskell became not greater than that of paying 15*s*. in the pound upon the debt. But it is equally clear that, although their personal liability was not greater than this, the testator's estate, represented by James, was to continue liable to Gaskell for 5*s*. in the pound more. The consequence of this liability of the testator's estate was this: that upon payment by that estate of the 5*s*. in the pound, there arose a new demand on the part of that estate against John and James for the full amount so paid. The question here is, whether, upon the face of the composition deed, there is any contract with respect to the liability of John and James which would arise in consequence of the payment of the 5*s*. in the pound by their father's estate — whether there was a contract on the part of the father's estate, that the claim of that estate to which I have referred against John and James, individually, should be given up.

In the first place, there could have been no such contract without a breach of trust on the part of James; for the beneficial interest in the testator's estate was given first to the widow for life, and then contingently to such of the sons as should be living at her death. It is clear, therefore, that James could not have entered into the contract contended for, otherwise than in direct breach of his duty as executor and trustee. In the next place, no such intention appears upon the face of the deed. In the recital, there is no mention of any beneficial interest under the will; and no such contract as that contended for can be collected, unless clearly expressed in the deed. In the absence of such expression it cannot be implied. It is said that there is some question of fraud with reference to the arrangements between James and Thomas; but I think that there is no ground for any such imputation.

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My decision is founded on the express reservation in the deed of Gaskell's rights against the surety's estate, and the necessary consequence of such a reservation, which is the right to indemnity on the part of the surety's estate against the principal debtor.

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STRONGE v. HAWKES.

July 11, 12, and 29, 1853.

*Incumbrances — Priority — Effect of Concurrence of Prior Incumbrances in Puisne Incumbrance.*

A widow who, under her marriage settlement and otherwise, was entitled to annual and other sums charged on her husband's estates, was one of the trustees of his will, whereby the estates were devised in trust to raise 2,000*l.*, for her benefit, and subject thereto in trust to convey the estates as the testator's daughter by a former marriage should direct. The daughter borrowed money upon the security of a mortgage of some of the estates, in which the widow and her co-trustee joined, and whereby, after reciting the will and the agreement for the loan, and that the daughter had directed the widow and her co-trustees to make such conveyance as was thereafter contained, the widow and her co-trustee, as devisees in trust, by the direction of the daughter, conveyed the estates to the mortgagee upon trusts for sale and for payment of the mortgage debt, and of the surplus as the daughter should appoint, and subject thereto according to the trusts of the will: —

- Held*, 1. That the mortgage did not pass the beneficial interest of the widow.  
2. That, nevertheless, her charges must be postponed to the mortgage, she having concurred in it, without reserving her priority.

THIS was an appeal from the decision of the late Vice-Chancellor, Sir James Parker, confirming a finding of Master Richards, as to priorities of incumbrances; and the question was as to the effect of the concurrence of an incumbrancer, but not in that character, in deeds creating subsequent incumbrances.

By a settlement made in contemplation of the marriage of John Blackburne and Eleanor his wife, dated the 22d of October, 1798, Mr. Blackburne covenanted with the trustees of the settlement to convey and assign to them all the real and personal estate to which Eleanor should thereafter become entitled, upon trust for her absolutely, in the event, which happened, of her surviving him, and of there being no issue of the marriage. By the same settlement, Mr. Blackburne demised to the trustees of the settlement, for the term of 500 years, a moiety of some salt works, to which he was entitled, upon trusts, for securing to Eleanor a jointure of 500*l.* a year in the event of her surviving him, and he covenanted with the trustees for the payment of the jointure.

In or previously to the month of August, 1807, Mr. Blackburne had received property of his wife's, to which she had become entitled after the marriage, to the amount of 12,308*l.*; and by a deed dated the 11th of August, 1807, he mortgaged an estate and some shares to the trustees of the settlement, for securing 12,308*l.* By this deed, he also

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charged all his real estates with the payment of the jointure. Mr. Blackburne afterwards received other moneys of his wife's, to which she became entitled after the marriage, to the amount of 766*l.* 13*s.* 8*d.*

Mr. Blackburne by his will, dated the 3d of August, 1820, gave and devised to trustees, one of whom was his wife, all his real and personal estate, in trust in the first place by mortgage, or sale to levy and raise so much money as would be sufficient to pay off and discharge his just debts, funeral, and testamentary expenses, and the charges attendant upon the execution of the trusts thereby in them reposed; and in the next place the several legacies and annuities by him thereafter bequeathed. After giving an annuity, the testator directed his trustees to levy and raise a sum of 2,000*l.* for the benefit of his wife; and as to all the residue of his real and personal estate, the trustees were to stand seised and possessed thereof, in trust for the sole and separate use of Alice Anna Hawkes, his daughter by a former marriage, (who was the wife of Thomas Hawkes, one of the trustees of the will,) for her life, for her separate use; and from and after the death of his said daughter, or during her life if she should so require and direct, notwithstanding her coverture, in trust to convey, transfer, and assign the same, and every, or any part thereof, to such person and persons, upon such trusts as his daughter, by any deed or will to be executed by her, should direct; and in default of such appointment, in trust from and after the death of the daughter, if Thomas Hawkes should have survived her, and she should not have made any disposition thereof to the contrary to apply the yearly rents, dividends, interests, and annual produce thereof, (or of so much thereof as might not have been so directed, limited, appointed, given, bequeathed, or charged,) to the said Thomas Hawkes during his life, for his own use and benefit, for the maintenance and support of himself and his children by the testator's said daughter, and for the advancement in the world of such children in such manner as he should think fit, free from the power or control of his creditors, and so that the same should not be subject to any mortgage, sale, assignment, transfer, or other disposition to be made by him thereof. And from and after the death of the daughter and Thomas Hawkes, in case the daughter should survive Thomas Hawkes, and should not have made any disposition to the contrary, in trust for the children, with an ultimate trust for Mrs. Hawkes.

Mr. Blackburne died in the month of November, 1826, without ever having had issue by his wife Eleanor. He left his wife Eleanor and Mrs. Hawkes and her husband surviving him. The will was proved by Eleanor Blackburne, Thomas Hawkes, and another executor, who died before the year 1832.

In the year 1832, Mr. and Mrs. Hawkes borrowed of Joseph Redish the sum of 5,000*l.*; and in the year 1835, they borrowed of John Holmes and William Rushton the sum of 5,650*l.* These sums were secured to Redish, and Holmes, and Rushton, respectively, by mortgages of parts of the real estates of the testator John Blackburne, dated respectively the 12th of June, 1832, and the 30th of October, 1835; and the question was, as to the effect of Eleanor Blackburne hav-

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ing been a party to the deeds by which these mortgages were created. The mortgage of 1832 was made between Eleanor Blackburne and Thomas Hawkes, (described as surviving devisees in trust of the will of John Blackburne,) of the first part, Thomas Hawkes and Alice Anna his wife, (described as the only child and heiress at law of John Blackburne,) of the second part, and Joseph Redish of the third part. It recited, first, the seisin of John Blackburne of the estate which the deed afterwards purported to convey. Then it recited the will of John Blackburne, and that Thomas Hawkes and Alice Anna his wife, having occasion for the sum of 5,000*l.*, had applied to Joseph Redish to advance and lend them that sum, which he consented to do, on having the repayment thereof secured in manner thereafter expressed. Then it recited as follows: "And whereas the said Alice Anna Hawkes hath required and directed the said Eleanor Blackburne and Thomas Hawkes, as such surviving devisees in trust as aforesaid, to make such conveyance as is hereinafter contained, which they have agreed to do." The operative part contained an appointment by Mrs. Hawkes under her power, and a release by Mrs. Blackburne and Mr. and Mrs. Hawkes, by which Mrs. Blackburne and Mr. Hawkes, "as such surviving devisees in trust, executrix and executor as aforesaid, at the request and by the direction of the said Alice Anna Hawkes," granted and released, and Mrs. Hawkes herself also granted and released to the mortgagee the parcels, "and all the estate and several estates, right, title, interest, use, trust, inheritance, and property, possibility, term, claim, and demand whatsoever, both at law and in equity, of them the said Eleanor Blackburne, Thomas Hawkes, and Alice Anna his wife, or any one of them," in the hereditaments thereby assured. The security was by way of trust for sale, with a declaration that in the mean time the mortgagee his heirs and assigns should stand seised of the hereditaments upon trusts for securing the 5,000*l.* and interest, and subject to these trusts upon trust for payment of the residue of the moneys, if any, to arise from the sale, and to convey and assure such part or parts of the estates as should not have been sold, to such person or persons and for such estates as Alice Anna Hawkes should appoint, and in default of any such appointment, then that the mortgagee, his heirs, executors, administrators, or assigns should pay such surplus moneys, and convey and assure such part or parts of the said manors, messuages, lands, hereditaments, and premises as should remain unsold and unappointed, under the trusts aforesaid, to the trustees or trustee for the time being of Mr. Blackburne's will, their, his, or her heirs, executors, administrators, and assigns, upon the trusts therein contained, or such of them as should be subsisting and capable of taking effect. There were covenants by Mr. Hawkes for himself and for his wife, and also for Mrs. Blackburne, for title and further assurance. And there was a covenant by Mrs. Blackburne with Redish that she had not at any time incumbered the estates. The deed closed with a declaration by which it was declared and agreed between all the parties that all terms of years in the premises should be held in trust, in the first place, for further and better, and more effectually securing the

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repayment of the 5,000*l.* and interest to Redish, according to the true intent and meaning of the deed; and from and after the payment thereof, in trust to attend the freehold and inheritance.

The deed of 1835 was in precisely the same form, except that, at the close of the description of the parcels, there was excepted the interest of Mrs. Blackburne in the salt works.

In the month of May, 1842, Mrs. Blackburne assigned the 12,308*l.*, secured by the mortgage of 1807, to the plaintiff, Sir James Matthew Stronge; and by her will dated the 2d of May, 1839, she appointed the plaintiff to be her executor. She died on the 2d of July, 1842, and the plaintiff proved her will.

The jointure annuity of 500*l.* a year and the interest of the 12,308*l.*, and 766*l.* 13*s.* 8*d.*, and on the legacy of 2,000*l.*, were duly paid to Mrs. Blackburne up to the 1st of December, 1838, but after that time both the annuity and the interest fell into arrear, and at the time of Mrs. Blackburne's death there was due to her, in respect of the arrears of the annuity, 1,791*l.* 13*s.* 4*d.*, and in respect of the interest on the 12,308*l.*, and 766*l.* 13*s.* 8*d.*, 1,797*l.* 11*s.* 10*d.* The 766*l.* 13*s.* 8*d.*, and the legacy remained unpaid, and the interest on the legacy was also in arrear from the 1st of December, 1838.

The appeal was from an order of the late Vice-Chancellor Parker, affirming the finding of the Master, by which, in effect, priority was given to Mrs. Blackburne's charges upon the testator's real estates in respect of the jointure, the covenant, and the legacy, over the mortgages in favor of Mr. Redish and of Messrs. Holmes and of Rushton; and the question was, whether this priority had been rightly given.

*Malins*, and *Shee*, supported the appeal.

*Wigram*, *Willcock*, and *Harrison*, were for the respondents.

The following cases were cited. *Payler v. Homersham*, 4 *Mau. & Sel.* 423; *Bragbrooke v. Inskip*, 8 *Ves.* 417; *Squire v. Ford*, 9 *Hare*, 47; *s. c.* 5 *Eng. Rep.* 32.

Knight Bruce, L. J. Upon the argument of this case,—an appeal from an order made on exceptions,—evidence, oral and documentary, which was before neither the Master nor the Vice-Chancellor who made the order, was, by consent, adduced and used; after considering which, we thought it right to ask Mr. Wigram, the leading counsel for the respondent, whether he would wish that there should be an inquiry into the circumstances under which the securities in question were prepared and (especially by Mrs. Blackburne) executed. This was declined by Mr. Wigram, on the ground of the unlikelihood, or impossibility, of adding usefully to the materials already in the possession of the court, a view of the matter very probably correct. We did not make a similar suggestion to the appellant's counsel, thinking it not at all likely that any such desire would be felt on their part.

Upon the whole of the documents and evidence now before us, both what was presented and what was not presented to the Master

and the Vice-Chancellor, I think that there is no ground for saying that, if any fraud, or deception, whether by misrepresentation or otherwise, was practised on Mrs. Blackburne, it was practised by or on behalf, or with the privity, of the persons to whom the securities were made respectively, or any one or more of those persons. I think that each of them must be taken to have acted fairly, and that neither security can be deemed to have been executed by Mrs. Blackburne under circumstances entitling her to have it reformed or to be relieved against it. The instruments, as they stand, must be taken to have bound her legally and equitably; but it is contended for the respondent that, even as they stand, they left her at liberty to enforce against the mortgagees, or incumbrancers, parties to them respectively, all the equitable rights affecting the lands comprised in them, which, under Mr. Blackburne's will, and her title anterior to the will, she was, immediately before the security of 1832, as to the lands comprised in that security, and immediately before the security of 1835, as to the lands in that, entitled to enforce for her own benefit.

If the respondent is well founded in this contention, Mrs. Blackburne, immediately after executing the deeds of 1832, might, as a creditor and legatee of Mr. Blackburne, have filed a bill against Mr. Redish for a receiver of the rents, and a sale of the property comprised in them, and so have deprived him wholly of the benefit of his security. I find myself unable to put such a construction upon the transaction,—unable to believe that his money was lent, or understood by any person to be lent, upon terms to which it would have been so much more than imprudent on his part to assent. True, Mrs. Blackburne only conveyed as a devisee in trust and as executrix; but she so parted with all the legal interest vested in her; and, if it had been intended that she should, nevertheless, retain for her benefit an equitable interest paramount the security, it must, I think, be supposed that so extraordinary an intention would have been expressed or intimated, which it is not.

The language of the security of 1832, throughout the instrument, appears to be tantamount to a declaration by Mrs. Blackburne to Mr. Redish, that she had not, at the time, any interest in the lands comprised in that security, or any claim upon them, beyond what she expressly conveyed, or that, if she had, she did not intend to enforce it against him; and justice, in my opinion, requires us to presume that he so considered the matter, and on that faith advanced his money and took the security. The same observations apply, I conceive, *mutatis mutandis*, to the security of 1835.

My excellent friend, Mr. Richards, first, and Sir James Parker, who, nearly at the close of his valuable life, made the order under appeal afterwards, having come to a different conclusion, I have hesitated in this matter, and distrusted my view of the case. Finally, however, entertaining that view, I am bound to act upon it.

With regard to the evidence, *dehors* the deeds, I may say that, as its addition to the cause has not appeared to me to help the respondent, so neither would its rejection, wholly or partially, have been, I conceive, of any avail to him. It is true, certainly, that at one time

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I doubted whether the correspondence and the drafts might not reasonably be contended to assist him. Upon reflection, however, I think that to attribute any weight to them would be to act on insufficient grounds, and, in truth, on mere conjecture. The consequence is, that, whatever reason Mrs. Blackburne may possibly have had, though I am not sure that she had any, to complain of some person or persons near to her or about her,—hard as the case may perhaps be on that lady or her representative, we are placed, I apprehend, under the necessity of postponing Sir James Stronge to the appellants.

TURNER, L. J., after stating the facts of the case, said :—

The question seems to depend upon two points. First, whether the mortgage deeds of 1832 and 1835 operated to pass the interests which Eleanor Blackburne had in the testator's estate in respect of the jointure, the covenant, and the legacy; and secondly, whether, assuming that these interests did not pass by the mortgage deeds, but remained in Mrs. Blackburne, it was competent to her and those claiming under her to set them up against the mortgagees, notwithstanding her execution of the mortgage deeds.

The first of these mortgage deeds is dated the 12th of June, 1832. (His lordship read it.) The other mortgage deed is in precisely the same form, except that, at the end of the parcels, there is the following saving. (His lordship read it.)

Upon examining these deeds, I am satisfied that they were not intended to operate so as to pass the interests of Eleanor Blackburne in the testator's estate in respect of the jointure, the covenant, and the legacy. The reasoning of the Vice-Chancellor upon that part of the case appears to me to be conclusive; but, if it required further support, I think that support would be found in the very frame of the deeds themselves. No purchaser or mortgagee, intending to acquire the beneficial interests of Mrs. Blackburne, could, as I conceive, have been content to rest the requisition of them upon such deeds as these. Had the deeds been intended to pass Mrs. Blackburne's beneficial interests, there must surely have been some recital of the existence of such interests, some clear and distinct assignment of them, and some equity of redemption reserved to Mrs. Blackburne in respect of such assignment, the deeds indicating no intention on the part of Mrs. Blackburne to give up her interests in favor of Mrs. Hawkes. The case therefore, upon the first point, seems to me to be reduced to this, whether the operative words of these deeds are so strong as to compel the court to hold that Mrs. Blackburne's beneficial interests passed by them, notwithstanding the indication of intention to be drawn from the other parts of the deeds; and I am of opinion that they are not, but the contrary. I think that the words, "as such surviving devisees in trust executor and executrix as aforesaid," override the whole operative parts of the deeds, and have the effect of confirming them to the interests which the conveying parties had, as trustees, in conformity with the intention to be collected from the other parts of the deeds. If, therefore, this case had

rested upon the first point, to which I have referred, I should have felt no hesitation in agreeing with the conclusion at which the late Vice-Chancellor arrived.

But the more substantial question in the case seems to me to arise upon the second point to which I have adverted; whether it could be competent to Mrs. Blackburne, and those claiming under her, to set up her interests in respect of the jointure, the covenant, and the legacy, against the mortgagees, after her having joined in the mortgage deeds. It has long been settled, that where a party having a charge upon an estate, encourages or even permits another to advance money upon the security of the estate without giving notice of the charge, the party who has thus been encouraged, or permitted to make the advance, is entitled to priority over the party who has thus encouraged or permitted the advance to be made. The fact of the party having the charge standing by and permitting the further advance to be made, without giving notice of the charge, is alone sufficient to support this equity on the part of the subsequent incumbrancer. The equity is still more strong where the party having the charge has participated in the transaction of the subsequent loan, or has made representations leading the other party to believe in the non-existence of the prior charge.

There are many cases which support this doctrine. The case of *Draper v. Borlase*, 2 Vern. 370, is, perhaps, the most apposite to the present. In that case, a Mr. Hill had lent Borlase 2,000*l.* upon mortgage of a manor, and upon a statute as a further security; and he afterwards, being at the bar, advised a Mr. Ive, on lending Mr. Borlase another sum of 2,000*l.* on mortgage of a different manor, and prepared the security, and inserted a covenant that the estate was free from incumbrances, making no mention of the statute. It was held that he could not set up the statute against the incumbrance of Ive. That case seems to me, in principle, to govern, and in its circumstances to be much less strong than the present. Mrs. Blackburne was party to the deeds by which these mortgages were created. Those deeds, upon the face of them, appear to me most plainly to import that she had no charge upon the mortgaged estates. The parts of the estates which remain unsold are to be reconveyed to Mrs. Hawkes's appointment, and to the trustees only in default of appointment by Mrs. Hawkes. All terms are to be held in trust, in the first place, for securing the mortgagees. These provisions cannot, I think, be considered otherwise than as amounting to a clear representation, by Mrs. Blackburne, that there was not, on her part at least, any prior claim under the trust.

It was said that the deed recited the trust for the payment of the debts and legacies, and did not recite that the debts and legacies had been paid, and that the mortgagees therefore were put upon inquiry, and so, no doubt, they were; but these deeds contain Mrs. Blackburne's answer to the inquiry in the representation which their provisions necessarily convey, that she did not intend to set up any charge upon the estate as against the mortgagees.

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*Regina v. The Eastern Archipelago Co.*

Chief Justice Campbell, when a verdict was given in substance for the crown, to the effect that a moiety of the capital required by the charter had not been paid up, and that the corporation had commenced business without such payment. On a rule to arrest judgment, on the ground that the declaration did not show that the Queen had by writing under the great seal or sign-manual revoked the charter, coming on to be heard before the Court of Queen's Bench in Banco, the judges were equally divided, and the rule dropped; the judgment therefore, *quod cancelletur*, was not arrested, but was given for the crown. 1 Ellis & Black. 310; s. c. 18 Eng. Rep. 167. A writ of error having been brought against that judgment into the Exchequer Chamber on the 22d November, 1853, a majority of the judges in the Exchequer Chamber were of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. 2 Ellis & Black. 568; s. c. 22 Eng. Rep. 328.

On the 30th November, 1853, the company presented a memorial and petition to the Queen in council, praying that her Majesty, on due consideration of all the circumstances of that most unusual case, would be pleased to instruct the Attorney-General to enter a *nolle prosequi* in this suit, so as to prevent the revocation of the charter, and the consequent interruption or violation of the company's existing arrangements and engagements, or otherwise to grant a new charter. The memorial and petition being still pending, and the prosecutor having taken steps to perfect the judgment obtained against the company, and to procure the charter to be brought into the Court of Chancery to be cancelled, the petition prayed that all further proceedings in the action of *scire facias* in which judgment had been given for the crown might be stayed, either wholly or until such time as the pleasure of her Majesty, in respect of the memorial presented to her by the petitioners, was declared.

*Rolt and Freeling*, in support of the petition.

The mode of revocation indicated by the charter was an express power, and superseded the implied power of revocation. It was therefore necessary, before any *scire facias* issued, that there should be a revocation by writing under the great seal, or by sign-manual, for the condition alleged to be broken. This view of the case was adopted by two of the learned judges in the Court of Queen's Bench; 1 Ellis & Black. 310; s. c. 18 Eng. Rep. 167, it would, therefore, be a just exercise of the Lord Chancellor's authority to direct the stay of proceedings until the result of the memorial should be ascertained. Not only was there no *mala fides*, but the directors have acted under the advice of the very board which might be said to represent the sovereign, inasmuch as it was the department to which all such matters are referred.

[The LORD CHANCELLOR. If that were so, it would follow that the board might at all times exercise a power to prevent a third party from suing out a *scire facias*.]

They referred to *Regina v. Neilson*, Webst. Pat. Cas. 665, where, in the analogous case of a patent, the effect of the order which was pro-

nounced was virtually to arrest proceedings in *scire facias*; and to *Regina v. Prosser*, 11 Beav. 306, as to the authority of this court to control the Attorney-General.

*Prior and Roupell*, contra.

The judgment of the Exchequer Chamber is to the effect that the right of the subject to sue out the writ of *scire facias* is not taken away by the power reserved by the crown in the charter: "Non poterit rex gratiam facere, cum injuriâ et damno aliorum."<sup>1</sup> We submit that, by that judgment, the charter was null and void, and that even the Attorney-General could not then enter a *nolle prosequi*; that this court was merely ministerial, and that, though the letters-patent might remain in chancery, yet that the Court of Queen's Bench might give judgment that they be revoked and cancelled. *Bynner v. The Queen*, 9 Q. B. 523; see p. 550.

The LORD CHANCELLOR, (LORD CRANWORTH,) upon being furnished with that authority, observed, — the judgment of the Queen's Bench in *Bynner v. The Queen*, 9 Q. B. 523; see p. 550, was in the following words: "That the said letters-patent be revoked, cancelled, vacated, disallowed, annulled, void, and invalid, and be altogether had and held for nothing, and also that the enrolment thereof be cancelled, quashed, and annulled, and that the said letters-patent be restored into her said Majesty's Court of Chancery at Westminster aforesaid, there to be cancelled." Nothing more could be done by the Attorney-General in this case, just as nothing more can be done by him after judgment in a criminal prosecution or capital felony. There can be no more prosecution of a suit by him after judgment, which nothing can affect but a writ of error. The only reason for coming here is, that the enrolment remains in this court, but final judgment has been entered up. With reference to that point, the Lord Chief Justice Tindal in the case of *Bynner v. The Queen*, 9 Q. B. 523; see p. 552, after a careful examination of the authorities, observes: "It was objected that, although this might be the practice where a final judgment might be given and execution had thereon in the Court of Queen's Bench, yet that in this case more remained to be done in the Court of Chancery, and which could not be done elsewhere, namely, that the letters-patent and the enrolment thereof, which still remained in the Court of Chancery, are directed to be cancelled. But it seems a sufficient answer to this objection, that nothing remains to be done in the Court of Chancery but a mere ministerial act by the officers of that court; and it is clear there is no difficulty in getting an exact transcript of the record of the judgment from the Court of Queen's Bench to the Court of Chancery by *certiorari* and *mittimus*." I, as one of the judges in the Exchequer Chamber, fully concurred in that judgment; and, in my opinion, the present case is concluded by that authority.

I have not the least hesitation in saying, that the facts disclosed

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<sup>1</sup> Bracton, cited by Lord Coke in the 3d Institute, p. 237.

*Chaffers v. Baker.*

entirely absolve the gentlemen who signed the certificate from all moral imputation; they acted on the advice of the Board of Trade. The Queen's Bench, however, cannot be bound because the petitioners and the Board of Trade were acting under a common error. The application, therefore, for a stay of proceedings, under the circumstances, is simply absurd, and, being entirely unfounded, must be dismissed with costs.

On the 3d of June, the matter was again mentioned to the Lord Chancellor, there being some doubt as to whether the registrar, or the clerk of the Petty Bag, or the Lord Chancellor's secretary, or the clerk of the patents, was the proper officer to draw up his lordship's order.

The Lord Chancellor held that it was the duty of the clerk of the Petty Bag.

On the 1st July, Mr. J. V. Prior moved, on the part of the prosecutor, that the company be ordered to bring in their letters-patent to be cancelled. The Lord Chancellor made the order. The company were thereupon formally called upon to appear, and, not appearing, an order *nisi* for the cancellation of the letters-patent was made. On the 15th July, the case was again brought before the Lord Chancellor, the clerk of the Petty Bag attending with the original charter, and the defendants, by their counsel, appearing and consenting, the seal was cut off, and the enrolment was vacated.

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CHAFFERS *v.* BAKER.

June 15, 1854.

*Practice — Pro Confesso — 79th Order of May, 1845 — Seal Day — Term Time.*

Although it is not the course of the court to hear special motions on other days than those appointed, yet, as every day in term is a motion day, a notice inserted in the Gazette, under the 79th order of May, 1845, for taking a bill *pro confesso* on a day in term, is a good notice, notwithstanding that the day for which notice is given is not a day regularly appointed for motions.

THE 79th order of May, 1845, provides as follows: "Where any defendant, who, under order 77, may be deemed to have absconded to avoid, or to have refused to obey the process of the court, has had an appearance entered for him, under orders 29, 31, or 32, and has not afterwards appeared in person or by his own solicitor, the plaintiff may cause to be inserted in the London Gazette a notice, that on a day in such notice named, (being not less than four weeks after the first insertion of such notice in the London Gazette,) the court will be moved that the bill may be taken *pro confesso* against such defendant; and the plaintiff is, upon the hearing of such motion, to

satisfy the court that such defendant ought, under the provisions of order 77, to be deemed to have absconded to avoid, or to have refused to obey the process of the court, and that such notice of motion has been inserted in the London Gazette, at least once in every week from the time of the first insertion thereof up to the time for which the said notice is given; and the court being so satisfied, and the answer not having been filed, may, if it so thinks fit, order the bill to be taken *pro confesso* against such defendant, either immediately or at such time or upon such further notice as, under the circumstances of the case, the court may think proper." Notice was given by the plaintiff that a motion would be made before Vice-Chancellor Kindersley, on the 14th of June, that the bill might be taken *pro confesso*, against two of the defendants, and this notice was inserted in the London Gazette of the 12th, 19th, and 26th of May, and on the 2d of June, 1854. The 14th of June was, in fact, the last day but one of Trinity term, the regular day appointed for hearing motions being the following day.

Cooper stated that he now moved before their lordships, at the request of Vice-Chancellor Kindersley, who expressed a doubt as to the strict propriety of making the order, in consequence of the 14th of June not being a regular day for hearing motions. His Honor had stated that he entertained no doubt of the propriety of the order on the merits of the case, but he thought that, in a proceeding of such a nature, the opinion of the higher branch of the court had better be taken.

KNIGHT BRUCE, L. J. Every day in term is a motion day, though it is not the course of the court to hear special motions, except on certain days. Properly speaking, there is no such thing as a seal day in term; that expression denotes the days appointed for motions out of term. I am of opinion that a notice of motion for any day in term is regular; and if your other materials are correct, you may take your order.

TURNER, L. J. There might possibly be some difficulty in the question, if the day named had fallen out of the term, but I see no difficulty in the case as it stands. I agree that the motion may be made, and the order *pro confesso* be taken.

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 Bolton v. Ridsdale.
 

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## BOLTON v. RIDSDALE.

May 27, 1854.

*Practice — Amendment of Bill — Procedure Amendment Act, s. 53.*

A plaintiff filed his bill, asserting a legal right, and at the hearing he was ordered to establish it at law. Before the trial, he alleged he had discovered circumstances which happened before he filed his bill, but of which he was not aware when he instituted the suit, and moved for leave to amend, under the 53d section of the 15 & 16 Vict. c. 86. The court, overruling a decision of one of the Vice-Chancellors, gave leave to amend.

THE bill in this case was filed in May, 1852, for the purpose of establishing the plaintiff's right to certain tin bounds in the county of Cornwall, upon which he alleged that the defendants were over-working. He moved for an injunction, and thereupon he was ordered to establish his right at law. The trial took place at Bristol, but the jury not being able to agree, they were discharged, and a new trial was directed. Before the time for the second trial, the plaintiff moved, before the Vice-Chancellor Stuart, for leave to amend his bill. By his affidavit, in support of the motion on that occasion, he swore that in January, 1854, he first became aware that a bill had been filed by one Mr. C. K. Bullman and others, shareholders in the Neath Consolidated Mining Company, against Mr. W. M. Thomas and others, from which suit he, the plaintiff, was enabled to discover certain facts, of which he was before ignorant, material to his case, and which, when introduced by the amendments he proposed in his bill, would show that the defendants were precluded from disputing his title, and so render the trial at law wholly unnecessary. The Vice-Chancellor refused leave to amend, and the plaintiff appealed.

*Rasch*, for the appeal, stated that the time for amending, under the 67th and 68th orders of May, 1845, was past, and that the application was founded on the 53d section of the Procedure Amendment Act, which gave leave to amend by the introduction into the original bill of facts occurring after the institution of the suit. The Vice-Chancellor was of opinion that, as the facts in this case did not occur after the institution of the suit, but were only discovered after that time, the section did not apply.

*Palmer*, for the respondents, supported the order of the court below, insisting that the plaintiff had not shown sufficient cause to induce the court to grant the indulgence he asked, and the more especially as he had not sworn that the alleged facts in *Bullman v. Thomas* could not, with reasonable diligence, have been ascertained.

Their lordships were of opinion that the application was reasonable, and that the Vice-Chancellor's order must be discharged; they, however, required the plaintiff to give an undertaking to prosecute the suit with due diligence after the bill was amended, which must be done within four days.

*Ex parte Turner; In re Boyle.**Ex parte TURNER; In re BOYLE.*

July 7 and 8, 1854.

*Solicitor's Bill — Payment — Taxation — Special Circumstances — Overcharge.*

A solicitor delivered his bill to his client, and by letter informed him that payment might be postponed if taxation were intended. The client gave the solicitor security for the bill, but no money was paid in respect of it:—

*Held*, that this was payment within the meaning of the 41st section of the 6 & 7 Vict. c. 73, (the attorneys and solicitors act.)

The client joined in the transfer of the security so given, and in the commencement of other matters employed the same solicitor, and in their completion employed another solicitor, and paid the second bill of costs:—

*Held*, that these were not special circumstances to justify the taxation of the bill of costs.

Unless overcharge amount to fraud, the court will not refer bills of costs for taxation after payment.

THIS petition was originally heard before Vice-Chancellor Stuart, who had directed the taxation of certain bills of costs.

The petition was presented by Mr. Turner, who described himself as a land agent, praying the taxation of three bills of costs, delivered to him by Mr. Charles Boyle, a solicitor, for business done, one for 450*l.*, a second for 180*l.*, both of which had been settled, the first by a security, the second by actual payment, and a third bill for 191*l.* which had not been settled or paid. The business transacted related to the buying and selling of estates, in which Mr. Turner was engaged and in which Mr. Boyle was employed as solicitor. The detail of the circumstances under which the security was given for the first bill, and under which the second was paid, will be found fully set forth in the judgment, and may be more conveniently referred to there. The main argument offered to the court, both before the Vice-Chancellor and on the appeal, on behalf of Mr. Turner, the petitioner, was, that the giving security for the 450*l.* bill did not amount to payment within the meaning of the 41st section of the statute 6 & 7 Vict. c. 73, inasmuch as no money passed from the client to the solicitor; and further, that there was undue pressure exercised by the solicitor over his client; and also that the bills contained overcharges, such as sums of money charged as bonus on particular business transactions not authorized by the usage of solicitors.

The cases of *Barwell v. Brooks*, 8 Beav. 121; *In re Whitcombe*, Ibid. 140; *Ex parte Wilkinson*, 2 Coll. C. C. 92; *In re Browne*, 2 De G. M. & G. 322, and *In re Dearden*, 23 Law J. R. (n. s.) Exch. 14; s. c. 24 Eng. Rep. 488, were cited and commented on.

The Vice-Chancellor having ordered the three bills to be taxed, Mr. Boyle appealed as to the first two.

*Malins and Selwyn*, for the appellant.

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*Ex parte Turner; In re Boyle.*

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*Bacon and Speed, for the petitioner, the respondent.*

TURNER, L. J. The order of the Vice-Chancellor directed the taxation of a bill of costs for 191*l*., which had not been paid, and respecting which there is no question; and also the taxation of two other bills which have been paid, and which form the subject of the appeal. The two bills amount, the one to about 450*l*., and the other to about 180*l*. I shall consider them separately. The words of the 41st clause of the statute are as follows: "That the payment of any such bill shall in no case preclude the court or judge to whom application shall be made, from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such court or judge, appear to require the same." In fact, the payment of a bill does preclude taxation, unless there are some special circumstances; and in every case, therefore, it is necessary to inquire whether there have been special circumstances, and whether those circumstances are sufficient to require the interference of the court. In the present case the circumstances are somewhat peculiar. It appears that Mr. Turner had, some time previous to August, 1853, become the purchaser of an estate for 4,500*l*., and not having money sufficient to complete the purchase, he proposed to raise 4,000*l*. on mortgage, and Mr. Boyle was employed by him as his solicitor both in the purchase and in the mortgage. \* It appears that Boyle claimed against Turner the sum of 100*l*., which was afterwards increased to 250*l*., as a bonus for conducting this transaction; and if this question had depended on the propriety of this bonus, it might have been a serious question whether such a charge could be supported. I desire, therefore, that no observations that I shall make may be understood as giving a sanction to a bonus of this kind. But the question here is, whether, after having paid the bill, the client has a right to have it taxed. On the 12th of August, 1853, the transaction relating to the purchase and the mortgage for 4,000*l*. was completed, and after the completion of this transaction, Boyle delivered a bill of costs amounting to 450*l*. The sale and mortgage then having been completed and the bill delivered, Turner was required to execute a mortgage for 1,000*l*. to Boyle, which sum was partly composed of the previous transaction and the bonus of 250*l*., and partly of a sum advanced by Boyle in the course of business for the payment of the deposit on the purchase. But as these sums did not together amount to the sum proposed to be secured, a balance was declared due to Turner of 82*l*., or thereabouts. On the 15th of October, (the security for the 1,000*l*. having been given in August,) the balance of 82*l*. was paid to Turner. The matter seems to have rested there till the 25th of August, 1853, at which period, other transactions having taken place, Boyle's mortgage was transferred, with Turner's concurrence, to a third person, and Boyle received payment of his debt. This completes the transaction of the bill for 450*l*. After the mortgage of 1853, it appears that Turner, who had effected several other mortgages on his estates, was advised to amalgamate them, and he, therefore, applied to Boyle to assist him in raising 4,600*l*. to pay the existing mort-

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*Ex parte Turner; In re Boyle.*

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gages, and in selling one of his estates, called Crier's Farm, for the same purpose. The transaction proceeded solely between Turner and Boyle until the month of February, 1854, at which time disputes first arose as to Boyle's bills of costs, and Turner applied to Mr. Dover to act as his solicitor, but consented that Boyle should continue to manage the business in which he was then engaged until its completion. This business was completed on the 25th of February; and in the mean time, on the 18th of January, Boyle had delivered his second bill of costs for 180*l.*; but this was not paid until some time afterwards, namely, on the 8th of March, when it was paid out of the money that was raised by the mortgage and the sale of Crier's Farm. No further steps were taken until the 17th of May, when Turner obtained an order to tax both these bills. The question now is, whether the facts which I have detailed are such special circumstances as to justify this order. In the first place, the bill for 450*l.* seems to me to be beyond all question. Here is a security for 1,000*l.*, in which is included 450*l.* for the amount of this bill, and this security was paid off when the mortgage was transferred on the 25th of August. But if it had not been paid off, I do not think that where there has been a delivery of a bill and a security given for the amount, it is necessary to show that there has actually been money handed over. In the present case, however, there is something more, for the settlement was ratified by the acceptance by Turner of the balance of 82*l.* And not only this, but the mortgage was dealt with as a valid mortgage, and transferred, with Turner's concurrence, to a stranger. Surely, when a man has not only settled a bill, but executed a security, and has allowed it to be dealt with, such a bill cannot be afterwards referred for taxation, unless on the ground of pressure or improper influence, entitling him to say that he was not a free agent. What circumstances were there of that nature in the present case? Turner was in the hands of another solicitor, and, without adverting to the rest of the correspondence between the parties, it will be sufficient to refer to the letter from Boyle to Turner of the 21st of February, in which he says he declines to take any thing off the bill of costs, but added, that if he (Turner) wished to postpone the settlement of the bill for the purpose of taxation, he (Boyle) would consent, but that he wished to press upon him (Turner) the necessity of having the bill taxed before payment, if at all, as it would be more difficult to accomplish that object afterwards. Mr. Boyle might have added, that the difficulty would be increased by the fact of his client having had the assistance of another solicitor. This letter is clear notice to Turner that, if he paid the bill of costs, such payment would be set up against him as being a payment not made under pressure, but after the offer of an opportunity for taxation. Surely, it is a little too much to say that after this the bill is still to be kept open. I think, therefore, that the same observations apply to this bill as to the bill for 450*l.*, and that there are no special circumstances which will justify the order for taxation; in short, that the parties ought not to be allowed, in cases of taxation, any more than in other transactions, to play fast and loose with their solicitors, as has been attempted to

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 Vincent v. Godson.
 

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be done in the present instance. But it is said that there are overcharges from which the client ought to be relieved. If overcharges are effected by fraud they will not stand in equity any more than any other fraudulent transactions.

What are the charges complained of here? The first is a charge of 15*l.* for a negotiation in respect of which it is alleged Boyle had agreed to make no charge. If the matter stood there, there might have been a question raised on this charge; but it appears that on the settlement of the mortgage, the item of 15*l.* was mentioned, and Boyle then said that the business had been a very troublesome one, and that the charge ought to be allowed, and the objection was thereupon withdrawn. There was, in fact, a new agreement upon the subject. The next items are certain charges for business which, it is alleged, were covered by the bonus of 250*l.* There is no evidence of this; and in the absence of evidence, the fact of the client having paid the bill must be conclusive against him. Then, there is a charge for copies of abstracts which ought not to have been made, or if made, ought not to have been paid for by the client; but why this ought not to have been does not appear. It is also complained that there are 240 letters charged for in one year; but it is impossible to say whether the circumstances may not have justified this number of letters. On the whole, I am of opinion that the alleged overcharges are not of that description which renders it necessary to open a bill which had been paid; that they do not, in fact, amount to fraud. The case of the petitioner entirely fails as to the special circumstances, and the taxation of these two bills must be refused.

KNIGHT BRUCE, L. J. It appears to me that those bills were paid by the client with full time and opportunity for consideration, without pressure, and with the assistance of another solicitor; and that, whether there are overcharges or not, they cannot be called gross overcharges. The petition for the taxation of these bills ought, therefore, to have been dismissed with costs. There will be no costs of the appeal.

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 VINCENT v. GODSON.

April 29, and May 3, 1854.

*Administration of Estate — Specialty Creditor — Rent — Relation of Landlord and Tenant — Lands out of the Jurisdiction.*

By an instrument in writing, operating as an agreement for and not as a lease, A. agreed to take, and B. to grant, a lease of a sugar estate in Jamaica, for a certain term of years, at a certain rent. A. died indebted to B. in respect of this rent. In a creditors' suit, instituted in the Court of Chancery in England for the administration of the estate of A.:

*Held*, affirming the decision of the court below, that B. was not entitled to rank as a specialty creditor in respect of such rent.

Rent due ranks as a specialty debt where the relation of landlord and tenant exists in respect

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of lands within the jurisdiction; and that, whether the demise be by writing or upon a constructive tenancy from year to year. But the doctrine being founded in privity of estate, will not apply where the lands, the subject of the demise, are out of the jurisdiction.

THIS was an appeal from the decision of Stuart, V. C., allowing exceptions to the Master's report of a specialty debt, reported 22 Law J. Rep. (N. s.) Chanc. 747; s. c. 17 Eng. Rep. 271.

*Malins* and *Renshaw*, for Lord Ward, the appellant.

*Swanston* and *Goodeve*, in support of the order below.

The following additional cases were cited: *Gage v. Acton*, Comb. 67; *Clayton v. Blakey*, 8 Term Rep. 3; *Thunder v. Belcher*, 3 East, 449; *Chapman v. Towner*, 6 Mee. & W. 100; *Brashier v. Jackson*, Ibid. 549; *Knight v. Benett*, 3 Bing. 361; *Dunk v. Hunter*, 5 B. & Ald. 322; *The Earl of Winchelsea v. Garretty*, 2 Keen, 293.

THE LORD CHANCELLOR, (LORD CRANWORTH.) In this case there are two questions involved: first, what would have been the result if the land had been in England; and, secondly, how far, if at all, that result is varied by the fact of the lands being in Jamaica. Now, as respects lands in England, there are some propositions which may be stated as free from doubt. First, that where the relation of landlord and tenant exists, whether the holding is upon a lease in writing, or upon a parol lease, or upon a constructive yearly tenancy, rent due is a debt which ranks in the administration of assets as a specialty debt. This may probably have originated from the fact that those who made the law were, for the greater part, recipients of rent; or it may have originated from this — that, in a sense, rent was charged upon the land by the right of distress. It was not, however, confined to cases where the right to distrain remained, because it existed even when the tenancy was at an end. This doctrine, at all events, has always been a part of the common law. Supposing, then, the lands to have been in England, the only question is, whether there was or was not such a holding as constituted the relation of landlord and tenant; and this depends upon the effect of the agreement, the subsequent possession, and the admission of Mr. Godson, as stated in the affidavit of Mr. Benbow, who was the agent of Lord Ward. The agreement was an agreement for a lease not amounting to an actual demise; and the execution of that agreement could not be held to constitute the relation of landlord and tenant. On the 1st of December, 1847, Mr. Godson entered into possession of the land, but even that was not sufficient to constitute the relation of landlord and tenant. By a familiar doctrine of law, where a person enters on possession of land in contemplation of a lease to be granted, circumstances of conduct may create the relation of landlord and tenant for temporary purposes. An agreement for a lease and a consequent entry on the land are not by themselves sufficient for the purpose, but there must be something, as payment of rent, to show that a tenancy was intended and so far carried into effect. Actual payment of rent is not essen-

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tial, though that perhaps is the clearest proof; but the case of *Cox v. Bent*, 5 Bing. 185, shows, and I think upon very intelligible grounds, that actual payment of rent is not essential. The question here is a question of evidence, whether there is any thing equivalent to the payment of rent in this case. Is the admission of Mr. Godson, deposed to in the affidavit, sufficient for the purpose? If the deponent had been under personal examination, and had said: "After the expiration of a year I met Mr. Godson, and he said, 'This rent is due, and I shall be glad of time, as it is not convenient to me to pay it now;'" that I should have considered sufficient evidence of a yearly tenancy until the lease was completed; or even if at the end of half a year Mr. Godson had said to Mr. Benbow: "At the end of the year the rent will be due, and I shall be able to pay it;" that would have come to the same thing. But here there is no such admission as to satisfy me that the parties must have been speaking of the same rent. If my judgment had turned on this alone, I should have been of opinion that justice required me to institute some further inquiry; but such is not the case.

The appellant has to maintain a further proposition — that this doctrine, holding as it does in the case of lands in England, holds also in the case of lands in Jamaica. Now, I have not the least doubt that the Vice-Chancellor was perfectly right in his view, that the doctrine does not apply to the case of lands in Jamaica, or to any lands out of the jurisdiction of these courts. The doctrine, however explained, arises clearly out of privity of estate, a doctrine connected with the old feudal tenure. In the case of lessor and lessee there is privity of estate, and further, there is privity of contract also; therefore, in an action between lessor and lessee there is privity of estate, whether the right arises from privity of estate or of contract, though it may sometimes be tested in this way, that if it arises out of privity of estate the venue is local; but that the doctrine in question had its origin in privity of estate is manifest from this, that no specialty debt is created by rent recoverable in an action for use and occupation where there is merely privity of contract. Suppose, for instance, the case of a tenant *per autre vie* continuing his occupation after the determination of the tenancy. In such a case there is no relation of landlord and tenant, except and until terms have been agreed upon, and the rent consequently can only be recovered by an action for use and occupation; and the right to recover such rent by way of compensation for occupation was never considered to constitute a specialty debt. Now the doctrine being clearly an incident upon the privity of estate, this seems to decide the case completely, for it is impossible in this country to maintain an action arising out of privity of estate in lands in another country. *Barker v. Damer*, Carth. 182. That case shows that an action of debt for rent against the assignee of a term is local, for the privity of contract is preserved to the assignee of the reversion by the statute of Hen. VIII. That seems to settle the question. No doubt, a landlord in England may maintain an action for rent due in Jamaica, but that is on the contract. The judgment of the Vice-Chancellor is perfectly right, and the appeal must be dismissed, with costs.

Hart v. Clarke.

## HART v. CLARKE.

November 11 and 13, and December 31, 1854.

*Company—Cost-book System—Forfeiture of Shares—Partnership—Dissolution—Rights of Retiring Partner—Laches—Legal Estate.*

A lease of a mine was made to A. B. and two other persons, co-adventurers, who agreed to work it upon the cost-book system. Calls were made which A. B. did not pay, and his co-adventurers declared his shares forfeited. A. B. had not abandoned his right, but after three years he filed a bill, praying a dissolution of the partnership and for an account:—

*Held*, (affirming a decree of the Master of the Rolls) that there is no custom in mines worked on the cost-book system to forfeit shares for non-payment of calls without a special stipulation:—

*Held*, also, (reversing the decree of the court below,) that the partnership was not determined at the time of the declaration of forfeiture, and that the plaintiff was entitled to an account, and to the appointment of a manager and receiver, and that, the plaintiff having a legal interest in the mine, it could not be affected by the acts of his partners.

THIS was an appeal from a decree of the Master of the Rolls. Thomas Hart, by an agreement dated the 14th of November, 1848, in consideration of 1,100*l.* purchased the interest of Mr. William Clements, under a take-note from General Wyndham, in the Goldscope and Uthwaite Mines, in the manor of Braithwaite and Coledale, in the county of Northumberland. This purchase was made by Hart, on behalf of himself, Andrew Clark, Charles N. P. Chapman, and George William Horn. On the 18th of the same month these four persons met, and the following resolutions were passed and entered in the cost-book; the purchase by Hart, on behalf of himself and the other co-adventurers, being adopted: "That the agreement of the 14th of November, 1848, be confirmed. That these mines be worked on the cost-book system, as recognized in Cornwall, or such other system as the directors hereafter named shall deem expedient. That meetings be held monthly, and that three directors do form a quorum; that, where occasion requires, the chairman shall have a casting vote; provided always, that, where four proprietors are present, and the chairman exercises his privilege of giving a casting vote, the subject so decided shall be confirmed at a meeting, which shall be called specially for that purpose. That this society be called 'The Goldscope Mining Company;' that the sum of 1,500*l.* be raised, in six shares of 250*l.* each, payable by instalments, the said number of shares being agreed to be held as follows: Mr. A. Clark, two shares; Mr. C. N. P. Chapman, two shares; Mr. G. W. Horn, one share; Mr. T. Hart the plaintiff, one share. That an instalment of 50*l.* per share be now made, payable at Messrs. Willis and Co., to the credit of the Goldscope Mining Company. That all checks, on behalf of this company, shall be drawn at a meeting of the committee, and be signed by two of the directors present. That Mr. Hart be appointed manager, to act gratuitously, under the direction of the committee, until the funds shall exhibit an actual profit to the company of 1,000*l.*

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from which time Mr. Hart's services shall be paid for at the rate of 100*l.* per annum."

On the 12th of January, 1849, Horn withdrew from the company, and an entry was made in the cost-book as follows: "12th of January, 1849, Mr. G. W. Horn having signified his intention to withdraw from this company, it was resolved that the one sixth share in the Goldscope Mining Company, late in the possession of Mr. Horn, be taken by Messrs. Clarke, Chapman, and Hart, in the proportion of one third to each proprietor. We, the undersigned, hereby agree to fulfil the conditions before recited, but limit our responsibility for payment of costs, as also our claims to advantage, to the extent of the number of shares held by us in the Goldscope Mining Company, according to the principles of the cost-book system, as recognized in Cornwall and Devonshire."

On the 26th of February, 1849, a lease was granted of the property, by General Wyndham, to Hart, Clarke, and Chapman, for the term of twenty-one years, under and subject to certain rents, royalties, and covenants. The mines were managed by Hart, in pursuance of the agreement, until November, 1849, up to which time 2,500*l.* had been expended on the works; and further capital being required, a call was made which Hart could not pay, and Clarke obtained possession of the works, and assumed the management of them to the total exclusion of Hart, and so continued down to the commencement of the suit.

A correspondence ensued between the parties, and was continued both before and after the 31st of May, 1850, on which day a meeting of the adventurers, other than Hart, was held, and it was resolved that Hart's shares in the adventure should be, and were then, forfeited, but no entry was made of that proceeding in the cost-book. The before-mentioned correspondence was considered, both in the court below and here, not to amount to an abandonment by Hart of his rights as a partner, and need not be further stated in this report.

The mine was worked, after the exclusion of Hart, up to the 31st of December, 1851, by Clarke and Chapman, at which time the excess of expenditure over returns, from the commencement of the undertaking, was between 3,000*l.* and 4,000*l.* Chapman then retired from the concern, on the terms of having two thirds of any future profits applied in recompensing him for what he had advanced, after which his interest was to cease; and a memorandum was entered in the cost-book, dated the 31st of December, 1851, reciting that Hart had refused all further payment after the 31st of October, 1849, and that, on the 31st of May, 1850, his shares were forfeited, and agreeing that Clarke should carry on the mine on his own account, and that Chapman should retire on these terms.

On the 27th of August, 1853, Hart filed his bill against Clarke and Chapman, praying a dissolution of the partnership and an account; that the property might be realized, and the affairs of the copartnership wound up under the direction of the court; and that, in the mean time, a receiver and manager might be appointed.

Evidence was gone into on both sides, as well upon the question

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whether the plaintiff had, or had not, wholly relinquished his right to the share he had in the partnership, as upon the custom of the cost-book system to forfeit shares. The court below considered that there had been no abandonment, by the plaintiff, of his right; but the Court of Appeal did not coincide in that opinion. It is not, however, thought necessary to state, in this report, the evidence upon that point, and, therefore, the testimony is confined to the other question, and will be found below.<sup>1</sup>

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<sup>1</sup> The following is the evidence for the plaintiff, which was given in answer to that taken for the defendants, but is here placed first in order: 1. John Taylor the elder, have for the last fifty-five years been extensively engaged in the working of mines, and had the management of very many mines in Cornwall, Devonshire, and Wales, and other parts of the kingdom. 2. I, John Taylor the younger, have also been extensively engaged in the management of very many mines for the last twenty-five years. 3. We are well acquainted with the true usage and practices of mines worked upon the cost-book system within the jurisdiction of the Stannaries Court, in Cornwall, as also mines in other parts of Great Britain, worked upon the cost-book system as recognized in Cornwall. 4. We deny it is a principle and usage of the cost-book system as recognized in the county of Cornwall, that when a call has been made upon the society or company of adventurers for the purpose of defraying the working and other expenses of such company of adventurers, and default is made by any partner in due payment of such call, the company, or copartners, at their next general meeting, or at any other meeting held after the time limited for the payment of such call, have full power to declare such shares forfeited. 5. We deny that it is according to the principles of the cost-book system, as recognized in Cornwall, that immediately upon the declaration of forfeiture of any share as aforesaid, not only such forfeited part or share in the mine becomes vested in the society or company of co-adventurers, but also a like part and share of and in the lease, set, take-note, grant, engines, tools, stock, tackle, materials, ores, halvans, and moneys in purser's or banker's hands, and all other the appurtenances to the said share belonging, together with all and singular the dividends to be thenceforth declared and payable upon and in respect of the said part or share, and all estate, right, title, interest, profit, privilege, office, properties, effects, and advantages whatever, incidental thereto or to be derived therefrom. There exists no power under the recognized cost-book system of partnership, for companies of adventurers to forfeit shares for default in payment of calls for defraying the expense of working mines. Nor can the shares, by any possibility, be forfeited in default of such payment as aforesaid, except an express stipulation or agreement, giving power to do so, be inserted in the cost-book, and signed by all the partners or co-adventurers in the said mine.

I, John Ferris Bennallack, have, for the last forty years, been extensively engaged with matters connected with the working of mines, and have also been extensively engaged in the conduct of suits in the Stannaries Court of Cornwall, and am the oldest practitioner in the said court. — (He then deposed to the same effect as the Messrs. Taylor, but added that there was no power of forfeiture for non-payment of calls, excepting where there is a stipulation to that effect in the cost-book, and signed by all the co-adventurers, "or by a decree of the Stannaries Court of Cornwall, for a sale of the share on proof of default.")

In addition to the affidavits, the following case, with the opinion of Mr. Smirke, was put in evidence: "A lease of mines in Cumberland is granted to A, B, and C, and it is agreed between them that the mines shall be worked on the cost-book system as recognized in Cornwall, or such other system as the directors might agree upon. No stipulation is entered into respecting a right to forfeit shares in the event of either of the parties not paying the calls for the expenses incurred in working the mines. Counsel is requested to state whether in the event of a partner not paying up the calls in respect of his share in the mines, the partners who have paid are empowered by the cost-book system, in the absence of an express stipulation authorizing them to do so, to forfeit the interest in the mines of the partner who has not paid up his calls." Opinion:

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Hart v. Clarke.

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The cause was heard, before the Master of the Rolls, on the 7th of June, 1854; and on the 9th of the same month his Honor gave judgment, in which he treated the plaintiff as a partner up to the 31st of May, 1850, when the shares were forfeited, and declared that there

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"There exists no power in the co-adventurers of a cost-book mine, or partnership, in Cornwall, to declare the share of an adventurer forfeited for non-payment of calls. It is true that in Cornwall, and within the jurisdiction of the Stannaries Court, there is a known process by which the shares of any adventurer, who has neglected to pay his proportion of the costs of working, can be sold for payment of such costs, but this is done on complaint to the court. Accordingly, under such sale, only so many shares are sold as may be necessary to pay the calls and the costs of the process, and the residue, if any, is repaid to the party in default. The result is, that the shares so put up for sale are transferred, and do not revert to the company or co-adventurers, unless no purchaser can be found. If a company out of Cornwall wish to obtain this benefit, they must enter into some special agreement for vesting in the manager or copartners a power to declare the shares forfeited for non-payment.

"EDMUND SMIRKE.

"Temple, March, 1854."

The defendants' affidavit ran thus: I, George Wells Snell, have for the last fifteen years been extensively engaged in the working of mines in Devonshire and Cornwall, and have been the holder of shares in a great number of societies or companies of adventurers for working mines in those counties. For a period of nine years immediately preceding the year 1851, I was engaged as purser to at least twelve mines in the said counties, and whilst in that capacity have paid as much as 2,000*l.* per month for working expenses. All the said mines with which I have been so connected, have been conducted upon the cost-book system, as recognized in the said counties of Devon and Cornwall, and I am, and have been for the last fifteen years, personally and perfectly acquainted with the true usages and principles of the cost-book system, as recognized in such counties. 2. It is a fundamental principle and usage of such system, as recognized in the counties of Cornwall and Devon, that the government and management of a society or company of adventurers founded on such system, and all and every the matters, transactions, and affairs thereof, are determined and resolved, not by a majority of voices, but by a majority of shares, and that a determination or resolution by the adventurers holding a majority of shares is conclusive and binding upon the whole society or company of adventurers. 3. It is a principle and usage of such system, as recognized in the counties of Cornwall and Devon, that where a call has been made upon the society or company of adventurers for the purpose of defraying the working and other expenses of such society or company of adventurers, and default is made by any adventurer in due payment of such call, the society or company of adventurers, at their next general meeting held after the time limited for payment of such call, have full power to declare such shares forfeited. 4. Such a declaration of forfeiture as last aforesaid is, I verily believe, fully and clearly authorized by the principles and usages of the said cost-book system, as recognized in the counties of Cornwall and Devon; and in all the societies or companies of adventurers for the working of mines with which I have been connected as aforesaid, under the circumstances aforesaid, the shares of defaulting adventurers have been forfeited as aforesaid; and such defaulting adventurers have not, at any time or in any manner, disputed or denied the usage or legality of such power to forfeit, and invariably have duly acquiesced therein. 5. According to the principles of the cost-book system as recognized in Cornwall and Devonshire, immediately upon declaration of forfeiture of any share as aforesaid, not only such forfeited part or share in the mine became vested in the society or company of adventurers, but also a like part and share of and in the lease, set, take-note, grant, engines, tools, stock, tackle, materials, ores, halvans, monneys in the purser's or banker's hands, and all other the appurtenances to the said share belonging, together with all and singular the dividends to be thenceforth declared and payable upon or in respect of the said part or share, and all estate, right, title, interest, profits, privileges, office, properties, effects, and advantages whatsoever incident thereto

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was a dissolution at that day.<sup>1</sup> From this decree the plaintiff appealed.

*Palmer, Collier, and Cooper* relied upon the evidence, as showing

or to be derived therefrom. 6. According to the principles of the cost-book system, as recognized in Cornwall and Devonshire, the period of fourteen clear days would be a reasonable and proper time to allow for the payment of a call, and has been and is the time allowed for the payment of calls in the societies or companies of adventurers with which I have been connected as aforesaid, and upon the expiration of which to declare shares forfeited for non-payment of calls for working expenses.

I, John Watson, have for the last four years continuously been engaged as secretary to numerous societies or companies of adventurers for the working of mines in the counties of Cornwall, Cumberland, Flint, Carmarthen, and Kirkcudbright; and I am now engaged as secretary to twenty-two societies or companies of adventurers for the working of mines in those counties, and all such societies or companies of adventurers have been and are conducted upon the cost-book system, as recognized in the counties of Devon and Cornwall, and I am, I verily believe, fully acquainted with the true principles and usages of such system. (The affidavit was thenceforward to the end in the same words as the last.)

I, Alexander Graham, am and have been for five years last past a director of a society or company of adventurers for working lead mines at Keswick, in the county of Cumberland, which is conducted upon the cost-book system, as recognized in the counties of Cornwall and Devon, and I am perfectly acquainted with the true usages and principles of such system, as I verily believe — (the affidavit then proceeded and concluded in the same words as before.)

<sup>1</sup> The judgment of the Master of the Rolls was, as to the points of forfeiture and dissolution, as follows: —

“A partnership was formed for the purpose of working this mine, not by any regular articles, but upon such terms as appear in the entry in the minute-book of the 14th of November, 1848. The original take-note was assigned for the benefit of all the adventurers, and the lease was taken for the benefit of the partnership. There is no material distinction in these cases between a legal and an equitable estate. There may be particular advantages attaching to the possession of the legal estate, but, where the property is partnership assets, the fact of its being taken in the name of one partner does not give him any particular rights above the others. The terms of the partnership did not specify any time for which it was to continue; and the rule in the case of a partnership for an indefinite time is, that any one of the partners may retire when he likes. I am clearly of opinion that the evidence, as to the cost-book principle, does not establish a right in the other partners to forfeit the shares of a defaulter. No such right exists unless particularly specified in the cost-book, which was not done here. A right to dissolve the partnership, however, existed; and on a dissolution by the other partners, the person removed would be entitled to continue in the concern till it was wound up. On the 31st of May, 1850, the defendants in effect declared the partnership between them and the plaintiff to be dissolved, and notice of their intention had been given by a previous resolution passed in Hart's presence. If he had said that he insisted on sharing the concern as a partner until it was completely wound up, it would be difficult now to deny his right to an account of subsequent profits. But he was not at liberty to play fast and loose, and this is what his conduct amounted to. . . . The time which elapsed would have been sufficient as a bar in a suit for specific performance, and the case is much stronger where the question relates to a mining adventure. Here the plaintiff comes, in 1853, after having had nothing to do with the mine since 1850, to claim all the rights of a continuing partner. I am of opinion that it is impossible for the plaintiff now to insist that he is a partner. The decree will be: Declare the partnership dissolved on the 31st of May, 1850, and ascertain the plaintiff's rights at that time. The value of the lease must be taken into account in estimating the value of the property. The plaintiff must be indemnified against any unpaid purchase-money, and against the covenants in the lease. I am decidedly of opinion that the possession of the legal estate does not entitle him to any particular benefit.”

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Powys v. Blagrove.

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said estates; and one of the questions in those suits being the duration of the trusteeship under the will, his Honor directed a case to be sent to the Court of Exchequer, to inquire of what estate the said John Blagrove (who was the heir of the surviving trustee, as well as tenant for life as aforesaid,) was seised in the freehold hereditaments under the will. The case will be found reported on these points in 1 De Gex & Sm. 252, and 4 Exch. Rep. 550, where the will of the testator is stated at length; and from the latter report it appears that the question sent to the Exchequer was answered by a certificate, that the said John Blagrove the younger was seised in fee-simple of the said hereditaments.

By an order in the said suits, dated the 13th of January, 1851; Henry Phillip Powys and Cecil Monro were appointed trustees of the said will jointly with the said John Blagrove the younger, and the said hereditaments were vested in the three for an estate in fee-simple in joint-tenancy upon the trusts of the will. The said Henry Phillip Powys and Cecil Monro now filed the bill in this suit against the said John Blagrove the younger, Anthony Blagrove, and John Henry Blagrove and others, as defendants, stating the above facts, and stating as follows: "Since they were appointed such co-trustees as aforesaid, the plaintiffs have ascertained, and the fact is, that the said estates have been allowed to fall and are very much out of repair, and the dilapidations thereon increasing; and the defendants, the said Anthony Blagrove and John Henry Blagrove, as the persons entitled in remainder to the estates, insist that, under the trusts of the said will, the plaintiffs and the said defendant John Blagrove (as such trustees as aforesaid) are bound to put and keep the said estates in repair, and have called upon and required, and are still calling upon and requiring, the plaintiffs accordingly to put the same estates, or cause the same to be put into and keep or cause the same to be kept in, a proper state of repair; and the plaintiffs have made or caused to be made repeated applications to the said defendant, John Blagrove the younger, (who is so as aforesaid in possession or receipt of the rents and profits thereof,) to comply with such requisition; but he declines so to do, insisting that he is under no obligation to comply therewith, and that the plaintiffs have no right to interfere, inasmuch as he contends that the trusts contained in the said will to keep the said estates in repair ceased upon the death of the said John Blagrove the elder, and that he, the said defendant, John Blagrove the younger is under no liability whatever in reference to keeping the same estates in repair, except as tenant for life thereof; whereas the defendants, Anthony Blagrove and John Henry Blagrove, as such remainder-men as aforesaid, insist that the said trust for repairs is a subsisting trust which ought to be performed, and that, in case of non-performance thereof, the plaintiffs will be liable as for a breach of trust."

The bill prayed, among other things, that the trusts of the will might be carried into effect; that it might be declared whether the said trust for keeping the said estates in repair was or was not a subsisting trust; and for a receiver of the rents, and an injunction to restrain the tenant for life from receiving the rents and profits of the

*Powys v. Blagrave.*

said estates, or interfering or intermeddling therewith or in the management thereof.

The cause came on to be heard before Wood, V. C., who decided that the trust for repairing, created by the will, ceased on the death of the first tenant for life; and that the court had no means of interfering in cases of permissive waste by a tenant for life of real property. The remainder-men under the will appealed against this decision.

*Rolt and Cottrell*, for the appellants.

*Chandless and Surrage*, for the plaintiffs, the trustees.

*Craig and Wickens*, for the tenant for life.

The following cases were cited: *Blagrave v. Blagrave*, 4 Exch. Rep. 550; *Shallcross v. Finden*, 3 Ves. 738; *Parteriche v. Powlet*, 2 Atk. 384; *Marquis of Ormonde v. Kynersley*, 5 Mad. 369; *In re Skingley*, 3 Mac. & G. 221; *Lansdowne, Marquis of, v. Lady Lansdowne*, 1 J. & W. 522; *Caldwall v. Baylis*, 2 Mer. 408; *Kingham v. Lee*, 15 Sim. 396; *Turner v. Buck*, 22 Vin. Abr. 523, tit. "Waste;" *Gibson v. Wells*, 1 Bos. & P. N. R. 290; *Marsh v. Wells*, 2 Sim. & S. 87; *Pugh v. Vaughan*, 12 Beav. 517; *Denton v. Denton*, 7 Ibid. 388.

*August 5.* The LORD CHANCELLOR, (LORD CRANWORTH.) There are two questions raised upon this appeal: first, whether, upon the true construction of the will, the trust to repair overrides the life estates given by the will; and, secondly, whether, independently of any express trust, it is the duty of the tenant for life to repair. On the first point, I think there is no subsisting trust to repair; and on that point I shall content myself with saying that I adopt the Vice-Chancellor's reasoning. As to the second point, it was argued that it was the duty of the tenant for life to repair, on the principle that *æquitas sequitur legem*. But the legal liability to repair is very doubtful; for in the cases of *Gibson v. Wells* and *Herne v. Bembow*, 4 Taunt. 764, it was held that there was no remedy at law, by action on the case, for permissive waste. But it is very certain, whatever the right at law may be, that this court has always refused to interfere in the case of permissive waste. *Wood v. Gaynon*, Amb. 395; and this, on the ground, as I understand it, that it would harass tenants for life. The case of *Caldwall v. Baylis* does not support the doctrine for which it was cited; for the decision appears to have turned upon a collateral point. The case of *Ex parte Skingley* appears to me to have no bearing whatever upon the question. In fact, there is not to be found in the books any precedent for holding the tenant for life liable to repair; and I shall not be the first to make one. The appeal must be dismissed, with costs.

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*Ex parte Bennett.*

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*Ex parte BENNETT; In re CAMERON'S COALBROOK STEAM COAL AND SWANSEA AND LOUGHOR RAILWAY COMPANY.*

April 29, and May 1, 2, 5, and 11, 1854.

*Winding-up Acts — Contributory — Transfer of Shares — Consent of Directors — Acts contrary to the Constitution of a Company.*

By the deed of settlement of a joint-stock company, no shares could be transferred without the consent of the directors. The company being unprosperous, and serious disputes existing, some of the shareholders agreed to pay a sum to the directors in full discharge of all their liabilities, which money was accepted, and transfers were made to two persons, and the shareholders retired. The directors applied the money partly in payment of claims of the lessors (who were also directors) of the property held by the company and partly in the payment of other claims, which were the subjects of the disputes. The company having been ordered to be wound up, the Master placed the name of one of the retiring shareholders on the list of contributories, and the Master of the Rolls refused to remove him; and, on appeal, the decision of the Master and of the Master of the Rolls was supported, the agreement being *ultra vires*, the directors having no authority thus to sanction the retirement of a body of the shareholders.

This case came on by appeal from the decision of the Master of the Rolls, who had declined to discharge an order of the Master placing the name of Mr. Bennett on the list of contributories of the above-named company.

The papers relating to the company and the litigation were of very great bulk, and the arguments in this court occupied no less than four days. The matter, however, necessary to be stated may be compressed into a reasonable compass.

The company was formed, in the year 1845, for the purpose of working coal mines under the estate of Colonel Cameron, a lease of which mines had been previously granted to Mr. William Booth Cameron, one of Colonel Cameron's sons. The company purchased the interest of Mr. W. B. Cameron under this lease for 150,000*l.*, and this lease having been surrendered, the company became the lessees of the mines, under Colonel Cameron, for a long term of years. By the company's deed, the capital of the company was to be 200,000*l.*, divided into 20,000 shares of 10*l.* each, 7,000 of which were taken by Mr. W. B. Cameron, in part of his purchase-money.

The deed contained several clauses relating to the transfer of shares. By section 108, it was provided "that any holder of shares in the capital of the company shall be at liberty to procure some other person or persons to become a copartner or copartners in respect of all or any of the shares held by him or her on which share or shares no arrear of instalments shall be due and unpaid, or to sell his or her share or shares to the company." By section 109: "Whenever any such holder or holders shall have procured some other person or persons to become a copartner or copartners in respect of all or any of the shares held by him, her, or them in the capital of the company, he, she, or they shall give notice in writing to the board of directors at the office of the company in London, and shall describe in such notice the name and residence of the proposed copartner or copart-

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*Ex parte Bennett.*

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ners, and the number or numbers of the share or shares in respect of which he, she, or they shall have procured such person or persons to become a copartner or copartners." Then, by section 110, the following power was given to the company: "Whenever the holder or holders of any shares shall be desirous of selling to the company, and shall give notice in writing to the solicitor of the company of his desire as herein provided for, it shall be lawful for the board of directors, with the authority and sanction of a general meeting of the copartners duly convened to purchase out of the funds or property of the company for the benefit of the copartners in the name of the company, at such price or prices as the board of directors shall deem fair and reasonable, all or any of the shares," &c. The 117th section then provided, that "Whenever any such notice as herein mentioned by any holder of any share or shares in the capital of the company, being the husband of a female copartner, or any executor or administrator of a deceased copartner, desirous of becoming or having procured some person or persons to become a copartner or copartners in respect of all or any of the shares held by him or her in any of those capacities, or by any holder being the assignee of a bankrupt or insolvent copartner, having procured some person or persons to become copartner or copartners, is approved of," then, on the transfer being made, the transaction is to be completed. The deed also contained provisions for the company to become purchasers of shares with the consent of a general meeting of shareholders, and for shareholders procuring persons to be transferees of their shares, with the consent of the directors. In the year 1848, great differences arose among the shareholders. A large body of them, who in the argument were called dissentient shareholders, were of opinion that the lease and purchase could be impeached for fraud, and threatened proceedings for that purpose, and to dissolve the company; a rather larger body of them considered that the concern would turn out to be profitable, if the company could be relieved from some claims then pressing upon it. In this state of circumstances, a negotiation, having for its object the transfer of the shares of the dissentient shareholders, took place between them and the directors, whose consent was necessary to the transfer; and this negotiation resulted in the following arrangement; it was agreed that the dissentient shareholders should, in consideration of being permitted to transfer their shares, pay to the company the sum of 8,000*l.*, and lend to the company upon its promissory note a further sum of 1,000*l.*; that thereupon the shares of the dissentient shareholders should be transferred to persons, who it was ultimately agreed should be nominated by the directors to take the transfers; and that the dissentient shareholders should be released by Colonel Cameron and Mr. W. B. Cameron from all claims under the lease in respect of purchase-money. The 8,000*l.* was accordingly paid by the dissentient shareholders, and was for the most part applied in payment of some debts and liabilities to the company, and among others in payment of some sums of Colonel Cameron for rent, and to Mr. W. B. Cameron in respect of his purchase-money. The dissentient shareholders also lent the 1,000*l.* to the company on its

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promissory note; and these payments being made, the shares of the dissentient shareholders were, for a nominal consideration, transferred into the names of Mr. W. B. Cameron and Captain Earle, two of the directors of the company, who were nominated by the body of directors to take the transfers, and who were afterwards registered as the transferees. The transaction was completed by Colonel Cameron and Mr. W. B. Cameron at the same time, and as part of the transaction, executing releases from all claims under the lease and in respect of the purchase-money. Upwards of 3,000 shares of the company were transferred into the names of W. B. Cameron and Captain Earle, under this arrangement. Twenty of the shares, so transferred, belonged to Mr. Bennett, whose case now came under the consideration of the court; and the question for determination was, whether, notwithstanding the transfer by Mr. Bennett, his name ought to remain on the list of contributories.

The Master put his name upon the list, and the Master of the Rolls refused to disturb the Master's decision; and hence the appeal.

*Thesiger, Lloyd, Selwyn, and Willes*, for the appellant.

*Palmer and Roxburgh*, for the official manager.

*Cooper*, for some shareholders.

The principal cases cited were. *Re Straffon's Executors*, 1 De Gex, M. & G. 576; s. c. 10 Eng. Rep. 275; *Ex parte Crosfield*, 2 De Gex, M. & G. 128; s. c. 13 Eng. Rep. 284; *Mew's Executors case*, 2 De Gex, M. & G. 522; s. c. 19 Eng. Rep. 210; *Doe d. Tatum v. Calamore*, 16 Q. B. Rep. 745; s. c. 5 Eng. Rep. 349; *Morgan's case*, 1 Mac. & G. 225; s. c. 1 Hall & Twells, 320; *Lawes's case*, 1 De Gex, M. & G. 421; s. c. 2 Eng. Rep. 106; *Stanhope's case*, 3 De Gex & Sm. 198; *Hollway's case*, 1 De Gex & Sm. 777.

May 11. KNIGHT BRUCE, L. J. This may seem a hard case on Mr. Bennett, the appellant; perhaps it is so; but the meaning and intention of the arrangement effected in 1849, of which the transfer made by him of the twenty shares in question formed a portion, were, on the part of the shareholders called the dissentient shareholders, (including Mr. Bennett,) and equally on the part of Colonel Cameron and his son, and the directors of this company, not that the dissentient shareholders should sell their shares, nor, substantially, that any other thing should be done than that they should pay 8,000*l.* or 9,000*l.* in a particular manner agreed upon, and, in consideration of that payment, be separated and released from the company, and freed, as far as Colonel Cameron and his son and the directors could free them, from all liability in respect of these debts and transactions. The particular form and mode of carrying the design into execution were a secondary and subsidiary matter. The form and mode in fact were, that the dissentient shareholders transferred their shares to Mr. William Booth Cameron and Captain Earle, two gentlemen

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selected for the purpose by the directors. I think it is not necessary for us to decide (and I do not mean to intimate an opinion) whether Mr. W. B. Cameron and Captain Earle took the shares on their own account, or on the account of either, or merely on behalf of the company, or the directors representing the company; though, if this last was the intention, the company was not bound by it, there having been no assent at a meeting of shareholders. But, whatever may have been the meaning or views of the directors in the matter, it is asserted on one side and denied on the other, in the present controversy, that the company became compellable to treat and look to Mr. W. B. Cameron and Captain Earle as the owners of the transferred shares, and had not the right to regard the transfers of them as ineffectual for the purpose of releasing or discharging Mr. Bennett and the shareholders similarly circumstanced. It appears to me, however, that the respondent who denies this proposition, is well founded in doing so; for, whatsoever the character in which it was meant that Mr. W. B. Cameron and Captain Earle should hold the shares, the nature and substance of the business were, I think, essentially contrary in spirit to the laws of the association. The directors assented to the transfers. An assent (necessary to their validity) was given, not from any notion or opinion of the fitness or eligibility of Mr. W. B. Cameron, or of Captain Earle, as a shareholder or large shareholder, in the ordinary or regular course, but as a sale by the dissentient shareholders, for the mere purpose that they might be released from their obligations to the company. How could it have been correct? how could it have been consistent with the true meaning of the deed regulating the administration of the affairs of the company, or with the duty of the directors, to sell their right of objecting to a person proposing to become a new shareholder by a transfer from an existing shareholder, even though the money thus obtained was not (and I have not said whether I think that it was) to be correctly applied? What power had they to set a price on the deliverance of shareholders? What right to ransom?—what authority, in a word, to alter the terms on which alone, according to the meaning of the deed, a new could be substituted for an old shareholder? The arrangement was a combination to defeat, at least, one important and material provision of the deed, and was, therefore, in effect, a fraud upon the company on the part of all concerned in it; and this I say without using the word “fraud” in an offensive sense; and especially without comparing the case to one, unhappily not very rare, of a servant bribed to allow his master to be cheated. But, although there were, I am satisfied, some individuals engaged in this affair of 1849 who would have recoiled with detestation from such a notion, if plainly presented to their minds, I am, in truth, not so well satisfied whether, on examining and probing the whole business thoroughly, the distinctions between that case and the present, for any purpose directly material in the litigation now before us, are not more apparent than real. It seems to me that Mr. Bennett has been reasonably and justly held by the Master first, and by the Master of the Rolls afterwards, to be a contributory; but we mean, as we may,

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perhaps, as well declare in our order, to leave unprejudiced and unaffected the rights of Mr. Bennett and the other dissentient shareholders, not only against the company in respect of the 8,000*l.* or 9,000*l.* paid in the remarkable manner shown by the evidence, but also generally against the Messrs. Cameron and all parties who concurred in the transaction of 1849. With regard to the respondent's costs of this appeal, I am of opinion that there are circumstances which render it fit that they should be borne by the estate of the company, and not by the appellant. I need scarcely add, that I consider the present order entirely consistent with what Lord St. Leonards did and said in the case of Straffon's executors.

L. J. TURNER, after briefly stating the facts, proceeded to say: The case comes before us now upon appeal from the decision of the Master of the Rolls. Upon the argument before us, the appellant's case was mainly rested upon the point that there was a legal transfer of the shares; and it was contended, on his behalf, that the transaction, upon the part of the shareholders, was in all respects a fair and *bona fide* transaction. The respondent, the official manager, on the other hand, insisted that the transaction, from the commencement to the termination of it, was fraught with suspicion and *mala fides*, and that, upon this ground, the transfer of the shares could not be maintained. All the facts of the case were most minutely and laboriously examined on both sides, with reference to this question of the *bona fides* of the transactions; but, in my judgment, it is not necessary for us to give, and I do not give, any opinion upon this point. There is, as it seems to me, a much more plain and simple ground upon which this case may be and ought to be decided; and I rest my decision upon that ground, and that ground alone. Assuming this transaction to have been perfectly fair on the part of the shareholders, was it a transaction by which the shareholders of the company would be bound by the acts of the directors? The directors of these companies are in a sense trustees, and have authority to bind the company to the extent of the powers given to them by the deeds under which the companies are constituted; but, in the absence of previous authority, or of subsequent concurrence on the part of all the shareholders, of which there is no sufficient proof in the present case, the directors have not, as I apprehend, any authority to bind the companies in any matters of substance, beyond the extent of the powers the deeds may give them. Moreover, in the exercise of the powers given them by the deeds, they must, as I conceive, keep within the proper limits. Powers given to them for one purpose cannot, in my opinion, be used for another and a different purpose. To permit such proceedings on the part of the directors of companies would be to sanction, not the use, but the abuse, of their powers; it would be to give effect and validity to an illegal exercise of a legal power.

These are the principles upon which, in my opinion, the decision of this court must be governed. We must consider, therefore, what powers are given to the directors by this deed, and what the extent

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*Ex parte Bennett.*

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and object of the deed were. The only provisions in the deed to which it appears to me material to advert, are sections 108, 109, 110, and 117, (the effect of which are before stated.) The contrast between these clauses throws, I think, some light upon the meaning of the deed. In matters which more immediately concern the interests of the whole company, as in the purchase of shares by the company, the whole body of shareholders is to be consulted, and the purchase is to be made with the authority and the consent of a general meeting. In matters which more nearly affect the interests of individuals, as the transfer of their shares, the judgment of the directors is deemed sufficient. The question, however, does not depend merely upon the contrast of these clauses, but it depends mainly upon the true meaning and intent of the 108th, 109th, and 117th sections, which apply to transfers by individual shareholders; and on examining those sections, I do not think that any thing will be found more favorable to the appellant's case. By the 109th section, parties procuring transferees are to give notice to the directors, and the notice is to specify the name and address of the proposed transferees. By the 117th section, the directors are to take the notice into consideration, and to signify their approval or disapproval of the transfer. The context of these sections of the deed seems to me to prove that what was really intended was this: that the directors of the company should be placed in a position which would enable them, upon each proposed transfer, to secure to the company solvent and responsible transferees; and, at all events, these sections, I think, certainly prove that each proposed transfer was to be the subject of distinct consideration, and was to be judged of upon its own circumstances. Now what has taken place in the case before us has been this: the question before the directors has been, not whether any one of these dissentient shareholders should be permitted to transfer his shares, but whether the whole body should be permitted to go out altogether,—a question involving many considerations which would not apply to the retirement of an individual shareholder, and which these sections giving power to the directors over separate transfers, did not authorize them to take into consideration. And even this is not the whole case; for the releases of the dissentient shareholders by Col. Cameron and Mr. W. Booth Cameron were parts of this transaction; and it appears upon the face of these releases that what the parties had been proceeding upon was a settlement of the disputes and differences between the shareholders. Surely, the section to which I have referred cannot be construed to have constituted the directors judges of what was expedient to be done in consequence of these disputes and differences; or to empower them to settle the terms on which those disputes or differences should be arranged. In truth, the powers given by this deed to the directors to give or withhold their consent to transfers, have been used for the purpose of enabling the directors to carry out the arrangement designed for the purpose of effecting the retirement of a large body of the shareholders; and it is clear that those powers have been so used with the knowledge of Mr. Bennett, and those associated with him.

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I am of opinion that this use of these powers was not warranted, and that this transfer therefore cannot stand. It was contended, on the part of the appellant, that the arrangement was for the benefit of the company, as it afforded a means of set-off against the purchase-money due to Mr. W. Booth Cameron; but the answer to this argument is, that unless the directors had power to make the arrangement, it was for each shareholder to judge what was most for his benefit, and the directors had no power to determine that question for them. I concur with Lord Justice Knight Bruce in the order which has been made.

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TREVILIAN V. THE MAYOR OF EXETER.

November 14, 1854.

*Exeter Canal Act, 1829 — Construction of — Powers to raise Money under — Misapplication of Money raised under — Decree as to Restoration of — Lien.*

The corporation of Exeter, being owners of the Exeter Canal, obtained an act of parliament giving them powers to raise an unlimited sum upon mortgage of the canal, for the purpose of carrying to completion certain improvements in the canal, which the corporation had commenced sometime prior to the passing of the act. The corporation raised a considerable sum under the powers given them by the act, a large portion of which they applied in paying off certain mortgages, which, prior to the passing of the act, they had effected upon their corporate property other than the canal, and the money raised whereby had been expended by them in the improvements in the canal effected prior to the act. Upon a bill being filed by one of the mortgagees under the act, challenging such an application of the funds raised by means of the powers given by the act: —

*Held*, that, upon the true construction of the act of parliament, the corporate property, other than the canal, which had been relieved by means of the statutory funds from the mortgages created prior to the passing of the act, was the first fund for paying those mortgages, inasmuch as it was not within the powers of the corporation under the act to raise money for the payment of any mortgages previously existing; and it was declared, that the moneys which had been so applied by the corporation ought to have been repaid to the statutory mortgagees ratably, and in proportion to the moneys advanced by them; and that the amount of such moneys constituted a debt due to the canal property, for which the mortgagees under the act had a lien upon the corporate property, other than the canal, comprised in the mortgages created prior to the act, so far as such property was remaining vested in the corporation.

THIS was an appeal from the decision of Sir R. T. Kindersley, V. C., upon the construction of the local act of parliament, 10 Geo. IV. c. 47, intituled "An act for altering, extending, and improving the Exeter Canal," passed in 1829. The canal in question was the absolute property of the corporation of Exeter, who, prior to the passing of the act, which was obtained by themselves, had commenced considerable works for the extension and improvement of the canal, and had expended thereon considerable sums, which they had borrowed upon mortgage not only of the canal and tolls, but other property also of the corporation. Being in want of further moneys to carry out their proposed scheme, they applied to parliament for powers of

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borrowing money, and procured the act above mentioned to be passed, which gave them an unlimited power of borrowing money, upon mortgage of the canal, for the purposes of the act. Having raised, under those powers, a very large sum, 89,900*l.* upon mortgage of the canal and tolls, they applied part thereof in paying off the former mortgages, so far as they were secured by the property of the corporation other than the canal. For several years after this, the canal profits were more than sufficient to keep down the interest upon the sums raised under the powers of the act; but they having ultimately become deficient for that purpose, the bill in the present case was filed by one of the mortgagees under the act, charging that the powers of the act were given for the purpose of supplying funds for the purpose only of completing the canal works which had been commenced prior to the passing of the Canal Act, and not for the purpose of defraying expenses previously incurred by the corporation about the works; and insisting that the corporation were to be treated, as between themselves and the mortgagees under the act, either as common mortgagors, and bound to make good out of their other corporate property any deficiency in the canal property for repayment of the statutory mortgages, or as trustees of the property raised under the act, who had committed a breach of the trust declared thereof by the act; and that, as regarded the other property of the corporation, the mortgagees under the act were entitled to stand in the place of the mortgagees prior to the passing of the act, whose mortgages had been paid off out of the statutory fund. The Vice-Chancellor, at the hearing of the cause, held, that the corporation, in what they had done, had not exceeded the authority given them by the act, and refused the relief prayed by the bill.

*Follet and Prior* appeared in support of the appeal. They cited *The Attorney-General v. The Corporation of Norwich*, 21 L. J. Rep. (N. S.) Chanc. 139; s. c. 9 Eng. Rep. 93; *Barnes v. Raxter*, 1 Y. & C. C. C. 407; and *Bugden v. Bignold*, 2 Y. & C. C. C. 377.

*Teed, Rolt, and Fooks*, contra, in support of the decree of the Vice-Chancellor.

Knight Bruce, L. J. We think we may at present lay down two general propositions at least with regard to this case, which may relieve Mr. Follet to some extent in his reply. I am of opinion, and I believe that my learned brother is also, that, in the absence of any proof to the contrary in the act of parliament—that is, presumptively—it must be taken, as between the corporation and those whom the plaintiff represents, that the estates with which the canal tolls were included, in the mortgages which preceded the act, were the first fund for paying those mortgages—as between, I say, the corporation and those whom the plaintiff represents. In the second place, I believe it to be also his opinion, as it is mine, that, according to the true construction of the act of parliament, (upon which, as the Vice-Chancellor has stated, it cannot be matter of surprise that different

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judicial minds should view it differently,) it was neither incumbent on the corporation, nor within their duty or reasonable powers—that is to say, or powers reasonably interpreted—to raise money, under the powers of the act, for the payment of any mortgage existing previously. In my opinion, not only would it exceed the bounds—the just bounds—of interpretation so to read the act, as far as the letter is concerned, but so to construe it would be against the spirit of the act, so far as any spirit is to be collected from the words which compose the statute. I differ with the less unwillingness and the less surprise from the Vice-Chancellor, as to the interpretation of the act, for the reason I have already mentioned, and which I have taken from him, namely, that it would be rather matter of surprise if all men should agree on the construction of this act, than that men should differ upon it, it being such a collection of words as it is. My learned brother has, I believe, taken a note embodying a declaration of the two propositions which I have mentioned; and if I have rightly understood him—he will correct me if I have not—Mr. Follet may regulate his reply, accordingly.

TURNER, L. J. My view concurs with that of my learned brother in this case. It seems to me, with the greatest possible respect for the opinion of the Vice-Chancellor—and of course I need not say that every word which falls from him is deserving of the fullest consideration—that, upon the construction of the act, the true intent of the act was to empower the corporation to raise moneys for the purpose of completing works which they had begun, and on which they had already expended a certain amount of money. The language of the act is, that they have already expended certain sums, and that they are unable properly to complete the same without borrowing further sums for that purpose. Now, so far as the money which they have expended had been actually converted into mortgages—that is, so far as they had actually made mortgages—it seems to me it is clearly beyond the powers of this act that they should, under the powers given by the act, raise moneys for the purpose of paying off the mortgages which they had so made. One view which strikes me is this: Under the clause which relates to the old mortgages—I mean the mortgages created before the passing of the act—all new property created under the act is made subject to the old mortgages; and it is very difficult, to say the least, to suppose that the legislature could contemplate the old mortgages being paid off, when they had thrown new works into old securities. Then, looking at that clause, and looking at all the clauses in the act which follow on the recital, “that they have expended very large sums of money, and are unable properly to complete the same without borrowing further sums for that purpose,” the first provision of the act gives power to them to complete and maintain the works, taking up the works as they stood. Then the 38th section of the act is, that the residue and remainder of the money—that is, after paying the costs of the act—is to be “used and employed for and towards making, completing, and maintaining the said canal and other works respectively hereby

authorized to be made, and to other the purposes of this act." Now, we must look through the act to see what the other purposes are; but it is not very easy, perhaps, to say what the legislature intended by those other purposes. It is sufficient to say that they could not have intended it for the purpose of paying off the prior mortgages. It would be difficult to say what would expressly fall within the words "other the purposes of the act;" but I think it is sufficient to say that the purpose of paying off the mortgages is no other purpose of the act. Then the 39th section contains a similar clause, that the money to be borrowed is to be laid out "for and towards the completing and maintaining the canal and works already made, and hereby authorized to be completed"—showing the purpose of the act to be the completion—"and other the purposes of this act, and to no other use or purpose whatsoever." Coupling that with the clause to which I have referred relative to the prior mortgages, I cannot, with the greatest possible respect for the judgment of the Vice-Chancellor, come to the conclusion that it was intended by the legislature to give the corporation power to raise moneys for the purpose of paying off mortgages which they had actually made, the money having been applied to the making of those works which it was the intent of the act of parliament should be completed under the provisions.

Following out that view, that they have no power to apply moneys in paying off preceding mortgages, the next consideration is, what ought to have been done with the moneys so raised? Now, undoubtedly, this act of parliament gives them power to raise an unlimited amount, but it limits the application of those moneys, and creates a trust of the moneys which are raised. The effect, therefore, is, that there is a certain amount of money legally raised, but unduly applied when raised; and what is the consequence? Why, I apprehend that money ought to be refunded to the persons from whom it has been raised. It is money legally raised under a trust, but not applied for the purposes of the trust. Take the case continually occurring in this court—a sale of real estate for the payment of debts. Where more of the estate is sold than is required for the payment of the debts, so much of the money as is not required for the payment of the debts falls back again into the trust; and so here, the money which is raised not having been applied, the trust fixes upon it for the persons from whom it has been raised. It seems, therefore, that the declaration should be, that the moneys which were raised and applied for the purposes of paying those mortgages ought to have been repaid to the mortgagees ratably, and in proportion to the amount of their several mortgages. Then comes this question: These moneys have been actually applied by the corporation, partly in paying the sums of money which were raised by them under mortgages which included other estates than the canal, and, as I understand it, it is traced that a certain portion of these moneys, to the amount of 34,000*l.*, has been actually applied in paying off mortgages which included not only the canal, but other property of the corporation. Now, that clearly not being a purpose warranted by the act, and these moneys being, as my learned brother and I think, to be considered as trust moneys in the

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*In re The Universal Salvage Co.; Ex parte Murray.*

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hands of the corporation, they are trust moneys specifically to be applied in payment of the mortgages; and the consequence must be, that there is a lien upon those estates for the amount of the moneys which have been so applied, subject always to this, that so far as those estates have been parted with by the corporation, and persons have acquired a title without any notice of such lien, that of course cannot be affected in this suit. Therefore, there can only be a declaration that there is a lien upon the estates of the corporation included in the prior mortgages, so far as those estates remain in the hands of the corporation. The short note which I have made of the declaration is this: Declare that the corporation were not authorized to apply any moneys raised under the act in paying off any securities which had been created before the act; and that, as between the corporation and the plaintiffs, the estates included in the mortgages so paid off, other than the canal property, are in the first place applicable to the payment of those mortgages. Then declare that the moneys which have been so applied ought to have been repaid to the mortgagees under the act, ratably, and in proportion to the moneys advanced by them, and that such amount constitutes a debt due to the canal property; and declare that the mortgagees have a lien for such amount upon the estates other than the canal property comprised in the prior mortgages, so far as such estates are remaining vested in the corporation.

*Follet, Q. C.*, said that, after what had fallen from the court, he would make no further observations in reply.

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*In re THE UNIVERSAL SALVAGE COMPANY; Ex parte MURRAY'S EXECUTORS.*

November 9, 1854.

*Joint Stock Companies Registration Act, 7 & 8 Vict. c. 110 — Construction of Section 29 — Contract between Director and Joint Stock Company, Confirmation of.*

The requisition of the 29th section of the Joint-stock Companies Registration Act, 7 & 8 Vict. c. 110, that any contract or dealing between a company and any director (except as therein mentioned) shall be submitted "to the next general or special meeting of the shareholders to be summoned for that purpose":—

*Held*, to be satisfied by a submission to the next general meeting of the company, though reference to a particular purpose was not made in the advertisement calling the meeting.

The case of *Teversham v. Cameron's Coalbrook Steam Coal and Lougher Railway Company*, 3 De G. & S. 296, observed upon.

THIS was a motion brought by permission of the court, by way of appeal, direct from the decision of Master Richards, to whom the order for winding up the affairs of the company was referred. The

question was, whether a sum of 300*l.*, advanced to the company by the Hon. Charles John Murray, deceased, in his lifetime, while acting as a director of the company, was, with interest at 5*l.* per cent. from the date of the advance, recoverable under the winding-up acts, as against the assets of the company. The facts were as follows: The company, having been projected in 1844, obtained a certificate of formal registration, under the statute 7 & 8 Vict. c. 110, on the 30th December in that year, and a certificate of complete registration, under the same statute, on the 9th January, 1846; and the Hon. Charles John Murray was, in conjunction with others, a director of the company on and previously to the 1st August, 1845, and thenceforth to the 4th May, 1848. By the deed of settlement of the company, dated the 18th August, 1845, it was provided, *inter alia*, that the board of directors should have the sole superintendence and control of the affairs of the company, subject, however, to the powers thereby given to the general meetings of the proprietors; that a general meeting of the proprietors should assemble once a year, namely, sometime in July in each year, at the office of the company; that a special general meeting of the proprietors might be called in the month of January in each year, or at any other time, by the board of directors, in manner therein mentioned; that every annual or special general meeting should have power to adjourn the meeting to another time or place; and that no other business should be transacted at a special general meeting besides the business for which it should have been called, and no other business transacted at an adjourned general meeting besides that left unfinished at the meeting at which such adjournment took place.

The deed also provided, that the board of directors should in no case have power to raise or borrow money upon the security or property of the company, or by any other means, save and except by bills of exchange or promissory notes, without the consent of the proprietors at an annual or special general meeting being from time to time first had and obtained; that the board should be at liberty, should they think fit, to draw, make, or accept bills of exchange or promissory notes, not exceeding at any one time the amount of 5,000*l.*, such bill of exchange or promissory note to be drawn or accepted, as the case might be, by and in the names of two of the directors of the company, and to be expressed to be drawn, made, or accepted by them on behalf of the company, and to be indorsed by the secretary of the company. The company's affairs having become embarrassed, a meeting of the board of directors was called on the 24th April, 1846, and it was thereat resolved unanimously: "That, under present circumstances, it is the duty of the directors, as a preliminary measure, before they negotiate a loan from their bankers or from any other capitalist, for the future operations of the company, to raise money amongst themselves, by advancing individually the sum of 300*l.* each, on loan notes of the company, so as to supply funds for payment of pressing debts." In pursuance of this resolution, Mr. Murray and other directors advanced 300*l.* each to the company; and at a meeting of the board, held on the 1st May, 1846, the following resolution was

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passed: "Resolved, that promissory notes of the company be signed by two directors, and countersigned by the secretary, for repayment at twelve months, with interest at 5*l.* per cent., of the advances of the directors, in pursuance of the resolution of the board on the 24th April last."

The next annual general meeting after this transaction was held on the 30th July, 1846, when, in the absence of an auditor's report of the accounts, (the office of the auditor being at the time vacant,) a report made by the chairman of directors, and signed by the secretary, was read to the meeting, the accounts in which contained entries of the advances of 300*l.* each, made by the directors in pursuance of the resolution of the 24th April, and to which advances the report referred as a reason for anticipating an improvement in the affairs of the company. This report, having been read, was adopted by the vote of a majority of the meeting. The meeting then proceeded to the election of an auditor, and then the meeting was adjourned until the 29th October, in order that the auditors might go into the accounts of the company and make a report, which should be brought before the adjourned meeting, so as to comply strictly with the terms of the act of parliament. At the adjourned meeting, on the 29th October, a balance sheet of the liabilities of the company was presented to the meeting, which had been previously audited and prepared by the auditors. At this meeting, the minutes of the proceedings of the former meeting of the 30th July were read over, and then the auditors' report on the accounts of the company, dated the 26th October, 1846, together with the balance sheets of the accounts of the company thereto prefixed. This balance sheet contained entries of the sums of 300*l.* advanced by Mr. Murray and other directors, pursuant to the resolution of the board meeting of the 24th April, 1846. It was then moved, seconded, and resolved unanimously by the meeting: "That the report of the auditors be adopted, and that the report of the directors read at the general meeting in July, and the auditors' report now read, together with the balance sheets of the accounts of the company, or an abstract thereof, be printed and circulated among the shareholders, under the directions of the board of directors." And, lastly, it was moved, seconded, and resolved unanimously, "That the cordial thanks of the general meeting are due, and are hereby given, to the directors, for their liberal and honorable conduct in their resolution of the 24th April last, to raise among themselves, by advancing among themselves individually the sum of 300*l.* each on loan notes of the company, a fund to supply payment of the then pressing debts of the company." The 300*l.* thus advanced by Mr. Murray was never repaid, and after the order for winding up the affairs of the company was made, the executors of Mr. Murray, who was then dead, claimed 313*l.* in respect of such advance, with interest, as against the assets of the company.

The claim was opposed in the Master's office, on the ground that this transaction was a contract or dealing with the company, within the meaning of the 29th section of the Joint Stock Companies Registration Act, and that the terms of such contract or dealing were

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not submitted to the next general or special meeting of the shareholders summoned for that purpose, pursuant to the terms of the statute.<sup>1</sup> The Master said his impression was, that sufficient notice of the meeting of July, 1846, had not been given to the shareholders. The question, he thought, depended entirely upon the construction to be put upon the 29th section of the statute, which he construed to mean, that the terms of the contract were to be submitted to "the next general meeting to be summoned for that purpose," or to "a special meeting to be summoned for that purpose." He thought the notice was not sufficiently clear to enable the proprietors to come there with a knowledge of what was going to be done.

*Bacon, Q. C.*, and *Bagallay*, in support of the appeal. The Master, in deciding upon this case, proceeded upon the authority of the case of *Teversham v. Cameron's Coalbrook Steam Coal and Swansea and Lougher Railway Company*, 3 De G. & S. 296; and undoubtedly, after that decision, it must be admitted that the advance in question in this case was a contract or dealing between a director and the company within the meaning of the act of parliament. That, however, was a case of demurrer to a bill which did not allege a confirmation of the contract by a meeting pursuant to the requisitions of the act; but it is submitted that here such a confirmation has been made.

[KNIGHT BRUCE, L. J. If all that was material in the bill there is stated in the report, that case may deserve further consideration. My impression is, that there was more in the bill; but I make the remark with great distrust.]

The terms of the contract or dealing in question were submitted to the next general meeting of proprietors in July, 1846, and the adjourned meeting of October following, which must be considered as a continuation of the same meeting, and were there and then approved and adopted by the meeting. This, it is submitted, was a sufficient ratification of the terms of the contract to make the company liable upon it. The words are, "submitted to the next general or special meeting to be called for that purpose;" the meaning of which is, "either to the next general meeting, or to a special meeting to be called for that purpose;" the words "for that pur-

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<sup>1</sup> The 29th section of the statute enacts, "that if any director of a joint-stock company registered under this act, be directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the company, whether for land, materials, work to be done, or for any purpose whatsoever, during the time he shall be a director, he shall, on the subject of any such contract in which he may be so concerned or interested, be precluded from voting or otherwise acting as a director; and that, if any contract or dealing (except a policy of assurance, grant of annuity, or contract for the purchase of an article or of service which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers) shall be entered into in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting."

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pose" having reference to the words "special meeting" only, and not to "general meeting." If it were otherwise, the words "general or special" would be surplusage, for notice of a special purpose is without meaning as relating to a general meeting, the mere fact of notice of a purpose being given rendering a meeting a special meeting, as distinguished from a general meeting. This distinction becomes evident on referring to the tenth provision of the 25th section of the act. The act, being restrictive of the rights of general creditors, must be construed strictly in their favor, and the burden is therefore upon the official manager of establishing the construction of the act which would deprive the creditor of a right which he would clearly have as against the company, were it not incorporated under the statute. *In re The German Mining Company*, 17 Jur. 710 ; s. c. 19 Eng. Rep. 591. Admitting, therefore, that sufficient notice has not been given within the clause of the deed of settlement, which provides that no other business shall be transacted at a special general meeting besides the business for which it shall have been called, it is submitted that no such notice is necessary, inasmuch as it is sufficient if the contract is confirmed at a general meeting. Finally, it is contended that what passed at the general meeting held in July, 1846, and by adjournment on the 29th October following, is a sufficient confirmation of the contract within the meaning of the act, and that therefore the Master's decision must be reversed.

*Selwyn*, for the official manager, *contra*. The proper construction of the act of parliament is, it is submitted, that, whether the meeting at which the transaction is to be confirmed be general or special, the particular dealing to be considered at that meeting must be stated by notice convening such meeting, and that the words of the 29th section of the act apply as well to a general as to a special meeting ; just as in cases under the Bankruptcy Act, where meetings are summoned to confirm any proposed settlement or compromise with the creditors, and in which it has been held that notice must be given to creditors of the precise object for which the meeting is called, and of every term of the arrangement to be proposed for the creditors' sanction. In the present case, all that was done was to read the balance-sheet of the accounts, and to state generally to the meeting that advances had been made by the directors, but the exact terms of the contract were not explained. This, it is contended, was not sufficient, the spirit of the statute being to prevent directors from contracting liabilities without the sanction of the company.

TURNER, L. J. It is unnecessary to trouble Mr. Bacon to reply. It is said that the Master desired that the case might be brought before the court ; and it cannot be said that he could well act otherwise after the decision in *Teversham's case*. Upon the question whether that case is one which should be adhered to under all circumstances, I give no opinion. I can quite understand that it may have been properly decided. It may well have been the intention of the legislature to discourage such contracts or dealings on the part of directors,

whether for goods, work done, or by way of loans or advances of money. The court would require to consider the case very closely before letting fall any thing tending to impeach it. I certainly should hesitate long before giving any opinion inconsistent with it. But it does not appear to me that the present case is at all governed by Teversham's case, because the act of parliament provides that a contract of this description may be confirmed, if submitted to the next general or special meeting to be summoned for that purpose. Now, it is said, in the first place, that this transaction was not submitted to the next general meeting within the meaning of the act of parliament, inasmuch as the words "next general or special meeting to be summoned for that purpose," import that there must be a summons calling the next general meeting, and stating the special matter to be considered thereat; and, in support of that argument, reference was made to the 25th section of the act of parliament, which defines the powers to be given to companies after registration, and which contains the expression "from time to time, at some general meeting of shareholders specially summoned for that purpose." That language, however, differs from the language used in the 29th section, because it is "general meeting specially summoned for that purpose," omitting the words "or special," contained in the 29th section. Therefore the words of the 29th section, "specially summoned for that purpose," do not fall in with the words of the 11th article of the 25th section. But, in considering that section in connection with the 29th section, it is quite clear that the word "next" does not apply to the word "special," and therefore that the words "next general meeting" are not connected directly with the words "special meeting," or with the words "to be summoned for that purpose." I think, therefore, that the true construction of this section is, that these dealings and contracts are to be submitted either "to the next general meeting," or "to a special meeting to be summoned for that purpose."

Then it is said that the condition, that the terms of the contract must be submitted to the next general meeting, or to a special meeting summoned for the purpose, has not here been complied with, there not being here a sufficient submission of the terms of the contract. It is admitted, however, that the report made to the shareholders at the general meeting of the 30th July, 1846, contained in it a notice of the resolution of the 24th April, 1846, to advance money on loan notes of the company. That meeting came on, and, at its conclusion, was adjourned to the 29th October, 1846, and in the mean time a report was made by the auditors of the company, stating the advances to the company of these sums of 300*l*. Whether it stated them to be made on promissory notes or not, that report was adopted and confirmed at the adjourned meeting of the 29th October, 1846. Now, whether that report contained a reference to the promissory notes or not, I think that the entry of the advance of 300*l*. in that report must be connected with the report made at the meeting of the 30th July, 1846, and therefore that it was, in effect, a notice that there had been advances made by Mr. Murray and others to the company upon its promissory notes. That notice having been given, it was

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 Gibson v. Goldsmid.
 

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competent for any shareholder at the meeting to have made inquiries as to those transactions, and to have taken the opinion of the meeting as to whether they should be confirmed or not. It appears, moreover, that having adopted the report, the adjourned meeting passed a vote of thanks to the directors for having made these advances, in terms showing that there had been a sufficient communication to the shareholders of the terms and character of the transactions. This sum, therefore, with interest, must be allowed.

KNIGHT BRUCE, L. J. I likewise accede entirely to the course taken by the Master in this case. Though specially circumstanced as it is, my impression is, that Teversham's case does not govern it. Upon the question, whether Teversham's case was rightly or wrongly decided, I think it unnecessary to say anything, and I abstain from giving any opinion upon it. It appears to be the just inference from the materials before the court, that, if this sum had been lent by a stranger, whether at interest or not, the stranger would have been entitled to recover it. From those materials, also, the just inference is, that the sum of 300*l.* was properly and duly applied by the directors for the legitimate purposes of the company. I am, therefore, satisfied that the principal sum of 300*l.* ought to be allowed. Upon the question of the interest upon the 300*l.* I have more doubt; but my learned brother being quite satisfied as to that question of interest, and the inclination of my own opinion being that it ought to be allowed, I certainly shall not dissent from him, but concur with him in the whole of his conclusion, that the 300*l.*, with the interest contended for, should be allowed.

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 GIBSON v. GOLDSMID.

November 14, 15, and 18, 1854.

*Specific Performance — Covenant — Rule "that he who will have equity must do equity" considered.*

By indenture of dissolution of a partnership, the defendant, in consideration of the covenant therein contained on the part of the plaintiff, assigned to the plaintiff certain shares in a foreign gas company, which by the deed were recited to pass by the delivery of the certificates, and covenanted with him for further assurance; and by the same indenture, the plaintiff, in consideration of such assignment, covenanted to indemnify the defendant against certain partnership debts. Upon the execution of the deed the certificates of the shares were handed over to the plaintiff, but certain formal acts required to be done by the law by which the company was regulated, before the property in the shares could be effectually vested in the plaintiff, were not performed:—

*Held*, that inasmuch as, upon the construction of the whole deed, the plaintiff's covenant of indemnity and the defendant's covenant as to the shares were legally independent of each other, a breach of the covenant of indemnity by the plaintiff, subsequent to the execution of the deed, did not constitute a ground of defence to a bill by the plaintiff for the specific performance by the defendant of the covenant for further assurance, by performing the formal acts necessary to be done in order effectually to vest the property of the shares in the plaintiff.

THIS was a bill for the specific performance of an agreement for the transfer of fifty shares in the D'Escheveiler Gas Company, the defendant having refused to do certain formal acts which were necessary to be done before, according to the law of Prussia, under which the company was formed and regulated, the complete ownership of the shares could become vested in the plaintiff. The agreement in question was contained in a deed of nine parts, dated the 3d October, 1851, and made and executed by and between eight persons as parties thereto, among them were included the plaintiff, Thomas Cummins Gibson, the defendant, Edmund Elsdén Goldsmid, and one John Grafton, for the purpose, *inter alia*, of dissolving certain partnerships therein mentioned. It recited that certain differences had arisen between the parties thereto, and that, to put an end to such differences, it had been agreed by and between them, that the said Edward Elsdén Goldsmid and John Grafton, jointly and severally, according to their several and respective interests in the premises thereby assigned, remised, and released, should make the assignments and assurances and enter into the covenants and agreements thereafter contained, and that, in consideration of their so doing, the said Thomas Cummins Gibson and John Grafton should jointly enter into the releases, and execute the indemnity thereafter contained on their parts; and, amongst other things, it recited that John Grafton and Edward Elsdén Goldsmid, as such partners as therein mentioned, were possessed of 176 shares in the Wazemmes Company, of certain numbers; and also of 50 shares in the D'Escheveiler Gas Company, of certain numbers; and also of 170 shares in the Carlsruhe Gas Company, numbered; and that Goldsmid was possessed of certain furniture, patent, and other property.

It then recited as follows: "And whereas all the said several shares hereinbefore named are, it is believed, transferred by delivery of the certificates or vouchers for the same." The indenture then witnessed, that for and in consideration of the premises, and of the releases and covenants thereafter made and entered into by and on the parts of the said Thomas Cummins Gibson and John Grafton, they, the said John Grafton and Edmund Elsdén Goldsmid, with the privity and approbation of the several other parties thereto, so far as they were or might be respectively interested, did jointly and severally thereby bargain, sell, assign, transfer, and set over unto the said Thomas Cummins Gibson and John Grafton, their executors, administrators, and assigns, all those fifty actions or shares, of 750 francs, or florins, or 30*l.* sterling, in the Compagnie d'Eclairage d'Escheveiler, otherwise "the Escheveiler Company," numbered respectively 3176 to 3200, and Nos. 3251 to 3275, both inclusive, together with all and all manner of benefit, interest, claim, and demand of them, the said John Grafton and Edmund Elsdén Goldsmid, jointly and severally, therein and thereto, to hold the same unto the said Thomas Gibson Cummins and John Grafton, their executors, administrators, and assigns, as and for their own property and effects absolutely; and the said Edmund Elsdén Goldsmid did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to

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and with the said Thomas Cummins Gibson and John Grafton, their heirs, executors, administrators, and assigns, that he, the said Edmund Elsdén Goldsmid, would, whenever thereto reasonably required, at the request, cost, and charges of the party or parties requiring the same, make, do, and execute all such further acts, deeds, matters, and things that might be required, as he lawfully could or might, or as should be in his power and ability, for the purpose of effectuating the transfers and assignments hereby made, and for vesting the shares and other estates and effects thereby assigned in the said Thomas Cummins Gibson and John Grafton; and each of them, the said John Grafton and Edmund Elsdén Goldsmid, did thereby severally further covenant with the said Thomas Cummins Gibson and John Grafton, their executors, administrators, and assigns, that they, the said John Grafton and Edmund Elsdén Goldsmid, then had in themselves, or one of themselves had in himself, good, right, and lawful and absolute authority to assign and transfer all and every the shares, property, estate, and effects thereby assigned and transferred by them respectively, and every part thereof, according to the true intent and meaning of these presents; and that the said shares, property, estate, and effects thereby by them assigned and transferred were free and exempt from all incumbrances by them or either of them committed; and that the said shares, property, estate, and effects, or any part thereof, were not liable to the debts, dues, claims, and demands of any person or persons whomsoever; and he, the said Edmund Elsdén Goldsmid, did thereby, for himself, his heirs, executors, and administrators, further covenant and agree with the said Thomas Cummins Gibson and John Grafton, that he had in himself good, right, and lawful and absolute authority to assign, transfer, remise, release, and surrender, in manner aforesaid, all and every the shares, property, estate, furniture, wine, and premises thereby by him separately assigned, transferred, remised, released, and surrendered respectively; and that the shares, property, estate, furniture, and premises were free from incumbrances by him committed; and that the said shares, property, estate, furniture, and premises by him, the said Edmund Elsdén Goldsmid, so assigned, transferred, released, and surrendered respectively, were not, nor was there any part thereof, liable to the debts, dues, demands, claims, and reckonings of any person or persons whatsoever. Then the indenture witnessed, that in consideration of the premises, and of the assignment and transfer thereinbefore made to them by Goldsmid, Gibson, and Grafton jointly, for themselves, their heirs, executors, and administrators, and with the privity and approbation of several others of the parties thereto, who were named, so far as they were or might be respectively interested, "covenant and agree that they, or the survivor of them, or their executors and administrators, will save harmless and keep indemnified Goldsmid, his heirs, executors, and administrators, and his and their estates and effects, of, from, and against the copartnership debts and liabilities of the several respective firms therein mentioned which were in subsistence and due and owing at the date of the said recited agreement, and from and against all specialties which the said Ed-

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mund Elsdén Goldsmid at any time theretofore had executed as a partner in the said respective firms during the said copartnership."

Then there was an assignment of Mr. Goldsmid's furniture and wine, in particular places mentioned, and then there was this covenant: "He, the said Edmund Elsdén Goldsmid, doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree, with the said Thomas Cummins Gibson, and John Grafton, their heirs, executors, administrators, and assigns, that he, the said Edmund Elsdén Goldsmid, will, whenever thereunto reasonably required, at the request, cost, and charges of the party or parties requiring the same, make, do, and execute all such further acts, deeds, matters, and things that may be required, as he lawfully can or may, or as shall be in his power and ability, for the purpose of effectuating the transfers and assignments hereby made, and for vesting the shares and other estates and effects hereby assigned, unto the said Thomas Cummins Gibson, and John Grafton, according to the true intent and meaning of these presents." Then the indenture further witnessed, that, in consideration of the assignment and transfer thereinbefore contained, on the part of Mr. Goldsmid, and also in consideration of the covenant and agreement thereinbefore and thereafter contained, on the part of Mr. Goldsmid, Gibson, and Grafton, and also other persons therein named, did jointly and severally release, and forever discharge, the said Edmund Elsdén Goldsmid, and his estates and effects of and from all sums of money, and all manner of actions, suits, reckonings, balances, charges, losses, gains, claims, and demands whatsoever, which, either at law or in equity, they, the said Thomas Cummins Gibson, and John Grafton, or either of them, or their or either of their heirs, executors, administrators, or assigns, or the said other persons therein named, or any of them, or their or any of their heirs, executors, administrators, or assigns, then had, or thereafter should or might, or otherwise could or might, have, claim, sustain, make, or demand from, upon, or against the said Edmund Elsdén Goldsmid, his heirs, executors, or administrators, or his or their estate or effects whatsoever and wheresoever, or any of them, or any part thereof, respectively, for or by reason, or on account of, the said several copartnerships so dissolved as aforesaid, or for, or by reason, or on account of any act, matter, or thing, in anywise relating to the said copartnerships, or any of them, other than and except under, and by virtue of, those presents, and the assignments, releases, and covenants therein contained.

And the indenture further witnessed, that, for the considerations thereinbefore lastly contained, he, the said Thomas Cummins Gibson, did thereby, for himself, his heirs, executors, and administrators, with the privity and approbation of all the said other parties thereto, so far as they were or might be respectively interested, and particularly of the said John Grafton, remise, release, and quitclaim, unto the said Edmund Elsdén Goldsmid, his executors and administrators, a certain judgment debt of 745*l.* therein specified as due from Goldsmid to Gibson; and that Gibson, or his heirs, executors, or administrators, should, and would forthwith, at the costs, charges, and

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expenses of the said Edmund Elsdén Goldsmid, whenever thereunto required, enter up satisfaction upon the said judgment to be reserved. Then followed a covenant, by Gibson and Grafton, to save harmless Goldsmid and his estate from all calls made, or to be made, upon the shares thereinbefore assigned and transferred; and the indenture then witnessed, that, in consideration of the aforesaid releases and indemnity, executed by the said Gibson and Grafton, he, the said Edmund Elsdén Goldsmid, thereby released to them, the said Gibson and Grafton, all claims, reckonings, accounts, bonds, bills, notes, and securities for money which he, the said Edmund Elsdén Goldsmid, then, or at any time theretofore, had against them, the said Gibson and Grafton, or either of them, save and except under, and by virtue of, the releases and covenants by, or on the part of, the said Thomas Cummins Gibson and John Grafton, thereinbefore respectively contained, to the intent that all claims and demands, of whatsoever nature and description, of the said Edmund Elsdén Goldsmid, against the said Thomas Cummins Gibson and John Grafton, or either of them, save and except as aforesaid, may be remised and released unto them. Lastly, it was thereby declared and agreed by and between the whole of the parties thereto, and they did thereby declare, that they would, at all times thereafter, so far as necessary to effectuate and carry out the object of the indenture, recognize and abide by the decision of French courts of law, for matters arising within the jurisdiction of the French tribunals, and of English courts, for matters arising within their respective jurisdictions.

And it was thereby further declared and agreed, between all the parties thereto, that the indenture should be received and read in evidence, in all and every the courts of law and equity, both in England and France, within their respective jurisdictions. Subsequent to the execution of the deed, John Grafton's interest in the D'Escheveiler shares became vested, by assignment, in Gibson, the plaintiff. It was alleged by the defendant, that, subsequently to such execution, he had been sued for, and obliged to pay, 250*L.* in respect of a debt against the liability to which the covenant of indemnity contained in the deed was given, and, upon being applied to by the plaintiff, to complete the transfer of the fifty shares in the D'Escheveiler Company comprised in the deed, by authorizing, in writing, the appendage of his signature to an entry of transfer, to be made in the company's books, at their chief office in Paris, he had refused, the ground of such refusal being, that he had not been indemnified in respect of the debt paid by him in conformity with the covenant contained in the deed. The plaintiff thereupon filed a bill for specific performance, by the defendant, of the agreement of October, 1851, by doing the acts necessary for vesting the shares in the plaintiff; and the Master of the Rolls, at the hearing, made a decree for an account of what had been paid or discharged by Goldsmid, since the date of the indenture of October, 1851, in respect of the liabilities of the partnership, and that the D'Escheveiler shares should be transferred to the plaintiff, upon payment of what had been paid by the defendant, in respect of the liabilities of the partnership and of the

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taxed costs of the suit. From this decree the present appeal was brought, upon hearing of which the question argued was, whether, assuming the plaintiff to be indebted to the defendant on the covenant of indemnity, the defendant was entitled, on that ground, to resist the plaintiff's claim to have the assignment of the shares perfected to him.

The principal arguments urged at the bar are considered in their lordships' judgments.

*Glasse, Q. C., and Terrell*, appeared for the plaintiff.

*Palmer, Q. C., and Waley*, for the defendant.

The following authorities were referred to: *Searle v. Law*, 15 Sim. 95; *Ward v. Audland*, 8 Beav. 201; *Hanson v. Keating*, 4 Hare, 1; *Rawson v. Samuel*, Cr. & Ph. 161; *Shish v. Foster*, 1 Ves. sen. 88; *Meliorucchi v. The Royal Exchange Assurance Company*, 1 Eq. Cas. Ab. 8, pl. 8; *The Grand Junction Canal Company v. Dimes*, 2 Mac. & G. 285; and Francis's Maxims, 4th edition of Fonblanque, App. i.

KNIGHT BRUCE, L. J. The question of which we have to dispose is, whether, upon the assumption against the plaintiff, for every present purpose, that the defendant's allegation of his right, under the covenant of indemnity contained on the plaintiff's part in the deed of the 3d October, 1851, to recover by suit against the plaintiff the present sum of money, is well founded, the plaintiff's title to relief in this case is obstructed or affected by that circumstance — a question which ought, I conceive, to be answered in the plaintiff's favor. The relief that he prays, so far as we are now dealing with it, is to compel the defendant to do a formal act, for the purpose of completing the plaintiff's title to certain shares in a continental undertaking, called "The D'Escheveiler Mining Company," which shares (at least, the original) were expressed and meant to be assigned by the defendant to the plaintiff and Mr. Grafton, by the deed of the 3d October, 1851; and it must, I think, be taken to have been intended by the plaintiff and the defendant, at the time of executing and in executing the deed, that, from the moment of its execution by them and Mr. Grafton, the shares should be placed in the absolute power of Mr. Gibson and Mr. Grafton, and that they should be thenceforth the sole and absolute owners of them. It appears, however, that, according to the law or regulations by which the shares are governed, some act beyond the execution of the deed was necessary, or is probably and with reason considered to have been necessary, in order to give, on the continent, complete effect to that intention. The formal act, which it is, as I have said, an object — is, indeed, the reason, if not the main and sole object — of the present suit to oblige the defendant to do, he resists, because, he alleges, the covenant on Mr. Gibson's part, which the deed contains, to indemnify the defendant against certain actual or supposed liabilities, has, with regard to another property, been broken, and because the breach must, as he asserts, be cured and remedied before the decree can be made effectual against him. The deed —

an instrument artlessly prepared, though seeming to extend to a considerable variety of circumstances—is not free from doubt in its provisions—is an indenture of nine parts, to which eight persons, I think, are expressed to be parties, and, so far as it can now be material to mention the contents particularly, runs thus:—

[His lordship read the parts of the indenture set forth above.]

Mr. Grafton's interest in the D'Escheveiler shares has become vested in Mr. Gibson, and was so when the bill was filed. Now, with regard to the indemnity which the defendant claims, he must, I conceive, be taken to have been, when they executed the deed, content to rely on the covenant of indemnity contained in the deed, and on the covenant only. The defendant alleges against the plaintiff, not any wrong of commission or omission on his part previous to the deed, or contemporaneous with it, but a wrong of commission or omission done at a subsequent time, though in breach of a covenant contained on his part in the deed. This appears to me to form, neither legally nor equitably, an impediment in the way of the actual assertion of his right to be placed in the position in which it was intended he should, immediately upon the execution of the deed by himself and Mr. Goldsmid and Mr. Gibson, be placed. The plaintiff having done all that was then incumbent upon him to do, by executing the deed, Mr. Gibson and Mr. Grafton paid the price of the shares. The defendant contends the plaintiff's position to be that of a party to a contract, who, having broken or omitted to perform a material term of it on his part, sues the other for specific performance of the other part of the agreement; but I do not accede to that. The plaintiff agreed to give a covenant of indemnity, and he did so. His subsequent breach of it, if he has broken it, forms no breach of the agreement to give it. His covenant of indemnity, and the defendant's covenant as to the shares, are legally independent of each other. Lien equally and set-off appear to me to be out of the case; and the rule, sometimes misunderstood—perhaps less wide in appearance than in expression—the rule, namely, that a plaintiff coming for equity must do equity, is without application in the present instance, as I view the matter. That unity of subject, or connection between subjects, which calls it into operation, is here, I think, wanting; and the plaintiff must be left to sue upon his claim for indemnity. He cannot effectually set it up in this cause—at least, according to my opinion. I desire to be understood, however, as not intimating what course it would, in my judgment, have been right to take, if we had not been satisfied that, in the transaction of October, 1851, the understanding and meaning of the parties were, that, from the time of the execution of the deed by the plaintiff and the defendant and Mr. Grafton, the shares—the original subscribers' shares—should at once and absolutely become the property of Mr. Grafton and the plaintiff; or if the plaintiff had, to the defendant's damage, acted wrongfully on a point directly and immediately touching his shares, the subject of pursuit.

TURNER, L. J. The bill in the case is filed for the purpose of compelling the defendant to do all such acts as may be necessary for

transferring to the plaintiff certain shares in the D'Escheveiler Company, which are mentioned in the bill. The title of the plaintiff rests upon the deed of the 3d October, 1851, which had for its object to put an end to the partnership in which the plaintiff and the defendant had been concerned, and to arrange the affairs of that partnership; and the deed contained the recital which my learned brother has referred to, that the shares of the company are, it is believed, transferred by delivery of the certificates or vouchers, and contains an assignment of those particular shares, and a covenant of indemnity against all the liabilities of the partnership. The defendant resists the plaintiff's claim to have a transfer of the shares perfected to him. He resists the claim upon this ground, that the plaintiff is indebted to him upon a covenant of indemnity. He insists that the plaintiff is not entitled to call upon him to perfect the assignment of the shares, until he pays the debt due on the covenant of indemnity. The Master of the Rolls was of opinion that this defence was well founded, and has accordingly made the decree by which the account is directed of what has been paid or discharged by the defendant, Goldsmid, since the date of the deed of dissolution, in respect of the liabilities of the partnership, and then a direction to tax the defendant his costs of the suit, and an order that the shares be transferred to the plaintiff, upon payment of what has been paid by the defendant in respect of the liability of the partnership and of the costs of the suit. The appeal before us is from this decree.

Upon the hearing of the appeal, the question was raised, whether there is any thing due to the defendant upon the covenant of indemnity; but, upon the suggestion of my learned brother, it was agreed that that question should be postponed, and the case should be first argued upon the point, whether, assuming the plaintiff to be indebted to the defendant on the covenant of indemnity, the defendant is entitled upon that ground to resist the plaintiff's claim to have the assignment of the shares perfected to him. The case was argued at the bar, and was rested by the Master of the Rolls in his judgment, upon the ground that the plaintiff, seeking specific performance, must perform his part of the contract; and, in effect, the judgment of the Master of Rolls rested upon the rule, "that he who comes into equity must do equity." This is a rule which is no doubt favored by this court, as its direct and immediate operation is to prevent multiplicity of suits—an evil which the court is always anxious to avoid. But the rule certainly does not go so far as to entitle the court arbitrarily to impose terms upon a plaintiff who may be driven to ask for its assistance; it is restricted in its operation, and the true meaning of it, as I apprehend, is this, that those who ask for the assistance of the court must do justice as to the matter in respect of which that assistance is asked. Lord Hardwicke, speaking of the rule in *Shish v. Foster*, 1 Ves. sen. 88, thus expressed himself: "The rule does not hold throughout, so as to tack things together which are independent in their own nature." Sir John Leach, in *Whitaker v. Hall*, 1 Gl. & Ja. 213, distinctly stated that the rule only applied to equity arising out of the same transac-

tion; and without mentioning the other cases, of which there are many, it is sufficient to refer to the case of *Hanson v. Keating*, 4 Hare, 1, in which Sir James Wigram has summed up the law upon the point with great accuracy and ability. He says: "The argument in this case, for the defendant, Mrs. Keating, was founded upon the well-established rule of this court, that the plaintiff who would have equity must do equity — a rule by which, properly understood, it is at all times satisfactory to me to be bound. But it is a rule which, as it was used in the argument of this case, takes for granted the whole question in dispute. The rule, as I have often had occasion to observe, cannot *per se* decide what terms the court should impose upon the plaintiff as the price of the decree it gives him. It decides in the abstract, that the court, giving the plaintiff the relief to which he is entitled, will do so only upon the terms of his submitting to give the defendant such corresponding rights, if any, as he also may be entitled to in respect of the subject-matter of the suit. What these rights are, must be determined *aliunde* by strict rules of law, and not by any arbitrary determination of the court. The rule, in short, merely raises the question, what those terms, if any, should be. If, for example, a plaintiff seeks an account against a defendant, the court will require the plaintiff to do equity, by submitting himself to account in the same matter in which he asks an account; the reason of which is, that the court does not take accounts partially, and, perhaps, ineffectually, but requires that the whole subject be, once for all, settled between the parties. It is only, I may observe, as a general rule, to the one matter which is the subject of a given suit that the rule applies, (*Whitaker v. Hall*, 1 Gl. & Ja. 213) and not to distinct matters pending between the same parties. So, in the case of a bill for specific performance, the court will give the purchaser his conveyance, provided he will fulfil his part of the contract by paying the purchase-money; and, *e converso*, if the vendor were plaintiff, the court shall assist him only upon condition of his doing equity by conveying to the purchaser the subject of the contract upon receiving the purchase-money. In this, as in the former case, the court will execute the matter which is the subject of the suit wholly, and not partially. So, if a bill be filed by the obligor in an usurious bond, to be relieved against it, the court, in a proper case, will cancel the bond, but only upon terms of the obligor refunding to the obligee the money actually advanced. The reasoning is analogous to that in the previous cases. The equity of the obligor is to have the entire transaction rescinded. The court will do this, so as to remit both parties to their original positions; it will not relieve the obligor from his liability, leaving him in possession of the fruits of the illegal transaction he complains of. I know of no case which cannot be explained upon this or analogous reasoning; and my opinion is, that the court can never lawfully impose merely arbitrary conditions upon a plaintiff, only because he stands in that position upon the record, but can only require him to give the defendant that which, by the law of the court, independently of the mere position of the party on the record, is the right of the defendant in respect of the subject of the suit.

A party, in short, does not, by becoming plaintiff in equity, give up any of his rights, or submit those rights to the arbitrary disposition of the court; he submits only to give the defendant his rights in respect of the subject-matter of the suit, on the condition of the plaintiff obtaining his own. Cases may, perhaps, be suggested, some cases of retainer, for example, in which a question can never arise except against a plaintiff; but, as a general proposition, it may, I believe, be correctly stated, that a plaintiff will never in that character be compelled to give a defendant any thing but what the defendant might, as a plaintiff, enforce, provided a cause of suit arose. *Lady Elibank v. Montolieu*, 5 Ves. 737; *Sutgris v. Champneys*, 5 My. & C. 102."

With this exposition of the law on this subject I fully agree; and the true question, therefore, in this case, seems to me to be, whether, upon the construction of this deed, the covenant for further assurance and the covenant for indemnity are to be taken solely and distinctly, or as connected together, so that the performance of the one was to be dependent upon the fulfilment of the other. I have examined the deed in this point of view, and I am fully satisfied that it was not intended by the parties that the covenants should be thus taken in connection. The recital to which I have referred seems to me of itself to be conclusive upon the point; it shows that the parties contemplated that the whole interest in the shares would pass by the assignment; and the shares must, therefore, have been intended to pass immediately, but the demand on the covenant of indemnity must, from its nature, be future and contingent. My opinion is, that the rule, "that he who comes for equity must do equity," does not apply to this case; and I think the case is not one to which the rule can advantageously be extended. The extension of the rule to such a case as the present would, as it seems to me, be attended with the greatest inconvenience. If the rule be applied to the alleged existing liability on the covenant, I think it must equally prevail as to other liabilities from time to time arising; and if the existence of liabilities furnishes a ground for this defence, I do not see how an inquiry whether the liabilities existed could, under any circumstances, be refused. Again: the effect of applying the rule to this case would be to bring into this court all legal questions arising upon a covenant of indemnity. It was argued for the defendant, that this rule ought to apply as to liabilities already arisen upon the covenant, or which may arise upon it pending the suit, without reference to the liabilities which may subsequently arise; but this does not seem to me to be consistent with the ordinary rule of this court; it is not the habit of the court to execute covenants partially; and if the defendant's argument be good as to liabilities which have arisen, I think it must follow that an account must be taken of all the liabilities, which must be satisfied or provided for before the plaintiff can compel a transfer. It was also argued by the defendant, that if the liabilities under the covenant had been incurred in respect of the shares sought to be transferred, the court certainly would not have compelled the transfer until the liabilities were satisfied. But the argument has no application

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to the case. In the event suggested, the liabilities would have been incurred in respect of the other matters in the suit, and the rule in question would, therefore, clearly apply. Upon the whole, my opinion is, that this decree cannot be maintained, and that there must be a decree for the execution of the covenant for further assurance upon the terms prayed by the bill.

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## Chancery.

### ADVERSE POSSESSION.

See *Scott v. Scott*, 5.

### AGENT.

*When his Acts bind his Principal.*] See *Wing v. Harvey*, 140.

### ANNUITY.

1. *Assignment.*] An annuity duly charged on freeholds was by deed assigned, and by that deed a further security was given by the grantors upon copyholds, in consideration of an additional sum of money paid to the grantors, and the sum payable for redemption was increased in amount. The assignees of the annuity appeared in the memorial to be trustees for other persons, but the trust was not disclosed on the deed of assignment:—

*Held*, that the deed of assignment, so far as it affected the copyholds, and so far as it contained any alteration of the term on which the original annuity was granted, was void, but that it was valid as an assignment of the original annuity. *Tidd v. Lister*, 462.

2. *Bolton v. Williams*, 2 Ves. jun. 138, observed upon. *Id.*

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### ASSIGNMENT.

1. *What passes.*] Under an assignment to creditors by a debtor of all his stock in trade, book, and other debts, goods, securities, chattels, and effects whatsoever, except the wearing apparel of himself and his family:—

*Held*, that a contingent interest in the residuary estate of a testator (to which the debtor was entitled in the event of his sister dying without a child) passed. *Ivison v. Gassiot*, 483.

2. *Pope v. Whitcombe*, 3 Russ. 124, observed upon. *Id.*

### ATTORNEY AND CLIENT.

1. *Deeds to Attorney.*] An attorney cannot sustain his purchase from a client unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger. *Holman v. Loynes*, 168.

## Chancery.

2. An attorney may deal with a client as a stranger, where the circumstances are not such as to put him under the duty of advising the client. — Per Turner, L. J. *Holman v. Loynes*, 168.
3. The relation of attorney and client was in this case held to continue, although the attorney had not acted as such for the vendor for more than a year previous to the purchase, (but prepared the purchase agreement, and charged accordingly,) he having previously been employed as attorney about an attempted sale of the same property. *Ib.*
4. The sale from a client in this case was set aside, on the ground that the consideration, an annuity, ought to have been considerably greater, by reason of the intemperate habits of the vendor, although the vendor, acting under the advice of an auctioneer, named the price and pressed the attorney to purchase. *Ib.*
5. Observations on the true consideration not appearing upon the purchase deeds. *Ib.*
6. Observations upon the analogy between the rules as to gifts and sales from clients to their attorneys. — Per Turner, L. J. *Ib.*

## ATTORNEY AND SOLICITORS.

*Solicitor's Bill.*]

See SOLICITOR. WINDING-UP ACTS.

## BANKRUPT ACT.

1. *Construction of.*] The official assignee of the bankrupt's estate is not a person to whom an allowance can be made, under the 160th section of the Bankrupt Law Consolidation Act, 1849, out of the estate and effects of the bankrupt, for assisting him to prepare his balance-sheet and accounts. *Russell, Ex parte*, 146.
2. A rule laid down by a district commissioner that the balance-sheet should be made out on every occasion of bankruptcy by the official assignee: —  
*Held*, by Sir G. J. Turner, L. J., to be contrary to the intention of the 160th section of the act, that section requiring rather that the commissioner should, in each particular bankruptcy, exercise a discretion, under the circumstances, whether to employ a person to assist the bankrupt or not. *Ib.*
3. *Building Society.*] The treasurer of a benefit building society held not to be "a person appointed to or employed in any office in any society established under any of the acts relating to friendly societies, within the meaning of section 167 of the Bankrupt Law Consolidation Act. *Bailey, Ex parte*, 190.
4. Sect. 12 of the Friendly Societies Act, 4 & 5 Will. IV. c. 40, and s. 4, of the Benefit Building Societies Act, 6 & 7 Will. IV. c. 32, are repealed by the Bankrupt Law Consolidation Act. *Ib.*

## BANKRUPTCY.

1. *Proof of Debts.*] A creditor brought an action against his debtor for the balance alleged to be due upon an account between them. The debtor consented to a verdict for 100,000*l.*, subject to a reference, the arbitrator to have authority to order a verdict to be entered for either party, with the costs of the suit and of the arbitration. The arbitrator, after more than six years, made an award in favor of the creditor for 11,455*l.* After the date of the award, and before judgment was signed, the debtor committed an act of bankruptcy, and gave notice thereof to the creditor, who afterwards entered up judgment, and subsequently the debtor was adjudicated bankrupt. The creditor claimed to prove for the awarded sum and the costs, which the commissioner allowed; whereupon the creditors' assignee appealed: —  
*Held*, that the creditor was entitled to prove for the debt awarded, interest and costs as a liquidated sum, on the ground that the award was more than a verdict rendering this sum provable as a debt, until it could be shown that the award could be set aside at law. *Harding, Ex parte*, 267.
2. *Annulning Adjudication.*] A party was adjudicated bankrupt, and the assignees sold chattels (alleged to have been mortgaged to A. B.) as being in the order and disposition of the bankrupt. The time had expired within which, by the 233d sec-

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- tion of the Consolidation Act, 12 & 13 Vict. c. 106, the bankrupt could have petitioned to annul, but A. B. presented such petition, and the commissioner, on the ground of want of trading, annulled the adjudication :—
- Held*, upon appeal of the petitioning creditor, that as, upon the evidence, it appeared that the application to annul was made at the instigation of the bankrupt, the adjudication must be restored, the court declining to decide the question of trading. *Emery, In re*, 328.
3. *Messengers' Fees.*] A commission of bankruptcy issued in 1817. A. B. acted as messengers from that time until 1821, and he was paid the greater part of his claim on account. Many years afterwards, moneys came to the hands of the official assignee, and the executors of the messenger petitioned for payment out of these moneys of the balance remaining due; but the court concurring in the view of the commissioner who had refused the application, declined to make any order. *Page, Ex parte*, 332.
4. *Summons for Examination of a Party.*] A bankrupt cannot without the concurrence of his assignee or assignees obtain a summons for the examination of a party under the 120th section of the Consolidation Act, (12 and 13 Vict. c. 106,) who is suspected of having bankrupt's property. *Dimsdale, In re*, 333.
5. *Costs of Action.* Two out of four bankrupts appealed from the adjudication, and the court of appeal gave them leave to try the question in an action, upon the undertaking of their solicitors to abide by such order as the court of appeal might make as to costs. The adjudication was sustained at law :—
- Held*, that the appeal must be dismissed, but without costs; the solicitors, in pursuance of their undertaking, to pay the costs of the action. *Castelli, Ex parte*, 334.
6. *Sale of Stock.*] Where the stock of a bankrupt had been sold in the country by tender, the court directed that the taxation of the scale of charges for such sale should be the same as adopted in London, namely, a scale between the charges for sales by auction and sales by valuation. *Hunt, Ex parte*, 336.
7. *Certificate.*] A trader, who was not engaged in any business, except as the owner of two small sailing vessels, kept no regular accounts. He contracted with a ship-builder for the repair of one of the vessels, and the amount claimed for the repair was far beyond the contract price, by reason of some alterations alleged to be beyond the contract. Cross-actions were brought, and settled by arbitration. The trader left England in a feeling of irritation at the result of the proceedings, and was declared bankrupt on the petition of the ship-builder. He had on a former occasion compounded with his creditors, paying them less than 15s. in the pound, but had been forced into this proceeding by misfortune :—
- Held*, that the bankrupt's conduct in quitting England was highly censurable, but would be sufficiently punished by suspending his certificate for twelve months, and allowing it as one of the second class. *Hodgson, Ex parte*, 405.
8. *Compounding with Creditors.*] Under the present act, the court will not universally refuse a certificate protecting the bankrupt's property, merely because he has on a former occasion compounded with his creditors, and paid less than 15s. in the pound. *Ib.*

BEGIN.

*Right to begin.*]

See *Senhouse v. Hall*, 850.

BENEFIT BUILDING SOCIETY.

1. *Security—Redemption.*] The owner of shares in a benefit building society gave a mortgage security on leaseholds for sums advanced to him by the society in respect of his shares; he subsequently gave notice of his desire to redeem the mortgaged premises, and a difference having arisen as to the terms of redemption, he filed a claim. The Lord Chancellor made a decree for redemption, directing calculation of the longest possible duration of the society at the date of the notice, having regard to the net assets of the society and to the monthly subscriptions and redemption money still continuing payable, and to the number of 100l. shares to be pro-

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vided for, and charging the plaintiff as a present debt with all subscriptions and redemption money which would become payable by him, assuming the society to endure for the whole of the calculated period, and crediting him with the amount of bonus payable at the date of the notice to withdrawing members. *Fleming v. Self*, 491.

2. The provisions as to arbitration contained in the 27th section of the act 10-Geo. IV. c. 56, and which are incorporated into the act 6 & 7 Will. IV. c. 32, do not apply to questions such as those raised on the above claim, the determination of which depended partly on the construction of the rules of the society and partly on the meaning of the mortgaged deed and the mode of giving effect to it. *Ib.*

## BEQUEST.

*Of Money does not pass Stock.] See Lowe v. Thomas, 238.*

## CANALS.

*Exeter Canal Act.]* The corporation of Exeter, being owners of the Exeter Canal, obtained an act of parliament giving them powers to raise an unlimited sum upon mortgage of the canal, for the purpose of carrying to completion certain improvements in the canal which the corporation had commenced sometime prior to the passing of the act. The corporation raised a considerable sum under the powers given them by the act, a large portion of which they applied in paying off certain mortgages, which prior to the passing of the act they had effected upon their corporate property other than the canal, and the money raised whereby had been expended by them in the improvements in the canal effected prior to the act. Upon a bill being filed by one of the mortgagees under the act, challenging such an application of the funds raised by means of the powers given by the act:—

*Held*, that, upon the true construction of the act of parliament, the corporate property, other than the canal, which had been relieved by means of the statutory fund from the mortgages created prior to the passing of the act, was the first fund for paying those mortgages, inasmuch as it was not within the powers of the corporation under the act to raise money for the payment of any mortgages previously existing; and it was declared that the moneys which had been so applied by the corporation ought to have been repaid to the statutory mortgagees ratably, and in proportion to the moneys advanced by them; and that the amount of such moneys constituted a debt due to the canal property, for which the mortgagees under the act had a lien upon the corporate property other than the canal, comprised in the mortgages created prior to the act, so far as such property was remaining vested in the corporation *Trevilian v. Mayor of Exeter, 578.*

## CARGO.

*See SHIPS AND SHIPPING.*

## CASES DOUBTED, EXAMINED, &amp;c.

<i>Attorney-General v. Drapers' Company, 4 Beavan, 67, questioned, . . .</i>	17
<i>Knight v. Ellis, 2 Brown, C. C., approved, . . .</i>	570
<i>Pope v. Whitcombe, 3 Russ. 124, observed upon, . . .</i>	485

## CHARITABLE BEQUEST.

*Construction of Will.]* A. by his will, after reciting that he had founded a school which had prospered greatly, gave and bequeathed to the corporation of S. and their successors forever all his right in certain lands, "provided and upon condition that they do pay" 40*l.* per annum to the said school and certain other specific bequests; and then he said, "the overplus which the said lands do produce, beyond and more than all these disbursements do amount unto, (which I do find and compute to be about 60*l.* per annum,) shall go unto him who is and shall be mayor of S. for the time being towards the expenses of the mayoralty." The will referred to an account annexed of the "income and outgoings" of all he had given to the corporation of S.; and, after setting down under "outgoing" all the specific disbursements as expressed in the will, a balance of about 60*l.* appeared, which was described

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"balance which the corporation of S. will gain per annum; and whatever the balance (*de claro*) proves to be, more or less, it is given every year to him that shall be Mr. Mayor in being." The rents having subsequently greatly increased, and an information having been filed to declare the right thereto:—

*Held*, reversing the decree of the M. R., that the will contained an absolute and unconditional gift to the corporation of S. of the surplus which remained after paying the specific disbursements mentioned in the will, and that the objects did not share the increased rents in the proportions in which they stood to each other at the time of the will. *Mayor of South Moulton v. The Attorney-General*, 17.

2. The state of the authorities commented on. *Ib.*
3. Whether *The Attorney-General v. The Drapers' Company*, 4 Beav. 67, was rightly decided? *Ib.*
4. *Mortmain.*] By his will, a testator gave a reversionary interest in personal estate to the mayor, jurats, and commonalty of the town of F., to be applied by them in such manner and for such purposes as they should judge to be most for the benefit and ornament of the town:—

*Held*, upon appeal, affirming a decree of the Master of the Rolls, that this was a good charitable gift, although the discretion given to the trustees might extend to an application of the fund in violation of the statute 9 Geo. II. c. 36, (the Mortmain Act,) the presumption being that where trustees of a testamentary gift for charitable purposes have, by the terms of the gift, a discretion to apply the benefit of the gift either in a way which the law allows or which the law disallows, they will act in a lawful manner. *Faversham v. Ryder*, 367.

## COMPANY.

See JOINT-STOCK COMPANY. WINDING-UP ACTS.

## CONTRACT.

*Construction of.*]

See RAILWAYS.

## COPYHOLDS.

1. *Freebench in.*] By the custom of a manor, the widow of a tenant was entitled for her freebench to an estate for life in one moiety of the copyhold tenement of which her husband died seised. A copyholder of this manor, seised of tenements to him and his heirs at the will of the lord, according to the custom of the manor, sold them, and having received the whole or the greater part of the purchase-money, surrendered them to the use of the purchaser and his heirs, in the manner usual on a completed purchase of copyhold property, part of the manor; and the surrender having been duly entered on the rolls, and the purchaser having taken possession of the tenements, the purchaser, without having been admitted, and therefore while the seller remained in fact tenant on the rolls, died; whereupon the customary heir of the purchaser entered, as heir, into the possession of the tenements, and remained in that character in possession of them, but without having been admitted, or having demanded or sought to be admitted to them:—

*Held*, that the widow of the purchaser was not either legally or equitably entitled to freebench against the heir; though if her husband, the purchaser, had been admitted under the surrender in his favor, she would clearly have been so entitled. *Smith v. Adams*, 182.

2. *Held* also, that the Dower Act, 3 & 4 Will. IV. c. 105, did not extend to or affect the case, although the widow was not married on or before the 1st January, 1834. *Ib.*

## CORPORATION.

See JOINT-STOCK COMPANY. RAILWAYS. WINDING-UP ACTS.

## COSTS.

1. *Retaxation of.*] Solicitors to the assignees of a bankrupt, had their bills of costs

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taxed in March, 1851, by the registrar of the Birmingham District Court, *ex parte*, without notice to the assignees, but in the presence of the official assignee, who had since died. In April, 1853, the assignees and some of the creditors applied to the district court for a retaxation of the bills, which, save 100*l.*, had not been paid, and retaxation was refused by the commissioner; but upon appeal:—  
*Held*, that such bills must be retaxed. *Bateman, Ex parte*, 261.

2. *Authority to review.*] As to the jurisdiction of the registrar to tax, Knight Bruce, L. J., doubted whether he had such jurisdiction prior to the orders of October, 1852, made pursuant to the Consolidation Act, 1849; but he had no doubt that, whether the registrar had such jurisdiction or not, it was the duty of the commissioner to review the taxation as a matter of course, and without proof of objectionable items; and Turner, L. J., while he considered it to be clear that the commissioner had authority to review the taxation, held it to be his duty to exercise that authority in a case where the bills contained a series of items *prima facie* unreasonable and entirely unexplained. *Id.*

## COSTS.

See *Castelli, Ex parte*, 334.

## COVENANTS.

*When Independent.*] See *Gibson v. Goldsmid*, 588.

*For Renewal of a Lease.*] See LANDLORD AND TENANT.

## DAMAGES.

*When liquidated.*] See RAILWAYS.

## DECREE.

*Forms of, ought not to be varied.*] See *Sherwin v. Shakspeare*, 358.

## DEMURRER.

See STATUTE OF FRAUDS.

## DISTRIBUTIONS.

*Statute of.*] See *Milne v. Gilbert*, 344.

## DOWER.

1. *When Widow must elect.*] A testator, by his will, gave his personal estate and an annuity to his wife, and devised his real estate to trustees, with power to "let" and cut timber:—

*Held*, affirming the decision of the court below, that the widow was put to her election between the bequests and dower. *Parker v. Sowerby*, 154.

2. All that is necessary in these cases to raise a case of election is, that there should appear upon the face of the will an intention which would be frustrated by the claim of dower; and *Hall v. Hill*, 1 Dru. & W. 94, decided that such an intention was shown by the testator giving trustees a leasing power over his real estates. *Id.*

## DRUNKENNESS.

*When affecting a Deed.*] See *Holman v. Loynes*, 168.

## ELECTION.

*Between Will and Dower.*] See *Parker v. Sowerby*, 154.

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EQUITABLE MORTGAGE.

1. *Tenants in Common.*] A and B, brothers, were tenants in common in tail of copyhold property, with cross remainders between them. B obtained a loan for A from C, for which A gave his promissory note, and deposited the title-deeds with C as a collateral security, and gave a written memorandum, by which he engaged "to make a formal surrender of my interest in the estate to which the said deeds relate, by way of further security, whenever thereunto required;" and B wrote at the foot, "I join in the deposit." A died unmarried, and without having surrendered to C, or barred the remainders. Upon a bill by C against B, seeking to foreclose the entirety:—

*Held*, affirming the decision of the court below,  
First, that this was a good equitable charge, not merely upon A's "interest" in his moiety, but also upon B's estate in remainder, and that B must bear the expense of surrendering that moiety. *Pryce v. Bury*, 178.

2. Secondly, that the charge extended only to the moiety of the estate which originally belonged to A. *Ib.*

EQUITY.

*When no ground of Relief in.*] See RAILWAYS.

EVIDENCE.

1. *In Inquiry under Decree.*] The meaning of the act 15 & 16 Vict. c. 86, s. 54, is, that where vouchers have been lost, or the accounts cannot be taken in the ordinary way, the court may give special directions. But such directions will not be given unless it appears that the ordinary evidence cannot be had, or merely to save expense. *Lodge v. Prichard*, 474.
2. *Semble*, that by the ordinary rules of the court, partnership books are admissible in evidence for and against all the partners and their estates. *Ib.*
3. *Semble*, that the 15 & 16 Vict. c. 86, s. 54, does not operate retrospectively. *Ib.*

FOREIGN LAW.

*Must be proved.*] Although a point of foreign law has been proved in this country and acted upon in reported cases, the courts will not act upon such decisions without the law being proved in each case as it arises. *M'Cormick v. Garnett*, 339.

FORFEITURE.

*Of a Contract — how waived.*] See *Wing v. Harvey*, 140.

FRAUD.

See ATTORNEY AND CLIENT.

FRAUDS, STATUTE OF.

1. *Sale of Real Estate.*] A party paid to an auctioneer, the agent for a proposed vendor, 50*l.* "as a deposit and part payment of 1,000*l.*" for the purchase of hereditaments, and received a receipt for the same, containing the words "the terms to be expressed in an agreement to be signed as soon as prepared." He had previously approved of the draft of the contract. At the time of taking the receipt, he agreed to sign the contract on the following morning. This he ultimately refused to do, and, by his solicitor, demanded back the 50*l.* The proposed vendor filed a bill for specific performance, to which a demurrer was put in setting up the statute of frauds as a defence, no agreement having been signed:—

*Held*, overruling a decision of one of the Vice-Chancellors, that the demurrer was a good defence to the bill. *Wood v. Midgeley*, 206.

2. *Demurrer.*] *Held*, also, but in accordance with the Vice-Chancellor's view, that the demurrer stating "that it appears by the bill that neither the agreement which is

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alleged by the bill, and of which the bill prays the specific performance, nor any memorandum or note thereof, was ever signed by this defendant, nor any other person lawfully authorized within the meaning of the statute," &c., was not a speaking demurrer. *Wood v. Midgeley*, 206.

3. *Held*, also, that the statute of frauds may be set up by demurrer as well as by plea. *Ib.*

## FRAUDULENT REPRESENTATIONS.

*Relief from Contract.*] Where a purchaser of shares in a mine had not relied upon the representations of the vendor as to the value of the mine, but had himself inspected the mine, the Master of the Rolls refused to relieve him from his contract:—

*Held*, on appeal, that as, upon the evidence, there was no proof that the representations made by the defendants were untrue assertions, which, if taken as true, would have added to the value, nor that these representations were merely conjectural, the plaintiff was not entitled to relief in equity, but that his bill must be dismissed, without prejudice, to any action he might be advised to bring. *Jennings v. Broughton*, 397.

## HUSBAND AND WIFE.

*Wife's Equity to Settlement.*] A fund was in court belonging to a married woman, she and her husband being both domiciled in Scotland. The husband and wife, had by memorandum, assigned this fund to a creditor of the husband. By the law of Scotland, a husband is absolutely entitled to his wife's personal estate:—

*Held*, that the wife had no equity for a settlement. *McCormick v. Garnett*, 339.

## INCUMBERED ESTATES.

The commissioners, under the statute 12 & 13 Vict. c. 77, (Incumbered Estates Act.) made an order in Ireland against a party for payment of money, or in default for commitment. The party was served with, but disobeyed, the order, and removed into England, out of the jurisdiction of the Irish court. Application was made, under the provisions of the same statute, to the Court of Chancery in England, to have the order enrolled, and the same being permitted, that court made an order at once, unconditionally, for an attachment. *Keogh, In re*, 200.

## INFANTS.

1. *Custody of Wards of Court.*] In 1836, H., a British subject, intermarried with E., a native of France, and the parties resided in Paris. There were five children of the marriage, who were all born in France. In 1853, the husband and wife separated, and the former came to reside in England. The wife continued in France, and retained two of the children, against the wishes of the husband; and in 1853, she instituted, in this country, a suit for divorce. In November, 1853, a bill was filed, in the name of the infant children, against the father and mother, to make the children wards of court. A motion was made that the mother might be ordered to deliver up the two children to the custody of the father:—

*Held*, upon appeal confirming the decision of the court below, that the court had jurisdiction to make the order, notwithstanding the children were born abroad, and that they and their mother were resident abroad; and it was ordered accordingly. *Hope v. Hope*, 249.

2. *Custody of Court over.*] Although the court will under special circumstances allow an infant ward to go out of the jurisdiction, yet it will not compel the removal of an infant ward out of the jurisdiction. *Dawson v. Jay*, 451.

An infant, being a British subject and also an American citizen, and having lost both father and mother, was brought over to England from the United States, where her property was situated, by a paternal aunt, with whom she resided; an application was then made by a maternal aunt, who had been appointed her guardian by the court in America, to have the custody of the infant delivered to her with the view of taking the infant back to America. The Lord Chancellor refused to inter-

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fere, being of opinion that he had no right to make such an order, even if on other grounds he had thought proper to accede to the application. *Dawson v. Jay*, 451.

See *Hicks v. Sallitt*, 212.

## INSURANCE.

*Life—Breach of Policy—Waiver.*] Indorsed upon a life policy was a condition that the policy should be void and the money secured thereby be forfeited to the use of the insurance company, if the insured should go beyond the limits of Europe without the license of the directors. The condition was infringed by the insured going to reside in Canada, where he died; but, after the breach, the local agent of the company, at the place where the policy had been effected, continued to receive the usual premiums upon the policy, with notice of the breach of the condition, which he represented as not invalidating the policy, provided the premiums were regularly paid:—

*Held*, that the notice of the breach of condition given to the agent of the insurance office was constructive notice thereof to the company; and that the latter, whether they had express notice of the breach or not, were precluded by the conduct of their agent from insisting upon the forfeiture upon the death of the insured. *Wing v. Harvey*, 140.

## INTERPLEADER.

*When it lies.*] B undertook to pay A the sum of 365*l.* at a particular time, and afterwards paid him 40*l.* on account. A then assigned the sum of 365*l.*, alleged to be due to him from B both to C and D, and C. and D. claimed to be paid this sum from B. B filed a bill of interpleader against C and D, stating the payment of 40*l.*, and requiring them to interplead as to the 325*l.*:—

*Held*, that, on account of the difference of the two sums of 365*l.* and 325*l.*, interpleader did not lie. *Diplock v. Hammond*, 202.

C and D had a dispute as to a sum of money in the hands of B. On the 9th of April, C gave notice to B that a bill would be filed as to this sum, and filed a bill accordingly on the 16th of April. On the same day B filed a bill of interpleader:—

*Held*, that interpleader did not lie. *Ib.*

## ISSUE.

*Meaning of, in a Devise.*]

See *WILL*.

## JOINT-STOCK COMPANY.

1. *Contract between Director and Company.*] The requisition of the 29th section of the Joint-stock Companies Registrations Act, 7 & 8 Vict. c. 110, that any contract or dealing between a company and any director (except as therein mentioned) shall be submitted "to the next general or special meeting of the shareholders to be summoned for that purpose:—

*Held*, to be satisfied by a submission to the next general meeting of the company, though reference to a particular purpose was not made in the advertisement calling the meeting. *Universal Salvage Co., In re.*, 582.

2. The case of *Teversham v. Cameron's Coalbrook Steam Coal and Lougher Railway Company*, 3 De G. & S. 296, observed upon. *Ib.*

See *WINDING-UP ACTS*.

## JURISDICTION.

1. *Of Equity in establishing a Will.*] The jurisdiction of this court in establishing a will against an heir at law is not limited to cases of a devise upon trusts, but extends likewise to cases of a simple legal devise. *Boyse v. Rossborough*, 101.

*Over Custody of Infants.*] See *Hope v. Hope*, 249.

## JUS CORONÆ.

See *SEA-SHORE*.

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## LANDLORD AND TENANT.

1. *Lease — Covenant for Renewal.*] A bill was filed for a renewal, setting forth articles of demise of 1746, by a party then seised in fee, and alleged to contain a covenant for perpetual renewal; that such articles were lost, but that a registered memorial, executed by the grantee only, existed in the registry office in Ireland; and that, in conformity with the said covenant, a lease was executed in 1750, by the grantor in the alleged articles, who, in the interim, had become tenant for life, containing such a covenant, and reciting articles, also showing subsequent renewals successively by tenants for life:—

*Held*, (affirming the decree of the court of chancery in Ireland,) that the memorial of the articles, though not executed by the grantor, was admissible in evidence against those claiming under him as purchasers both of the execution of such articles and also of their contents, and that the successive renewals by subsequent tenants for life were evidence, in support of the memorial against the remainder-man, of the execution of such alleged articles. *Sadler v. Biggs*, 74.

*Held*, further, that an agreement contained in a memorial to demise certain lands for three lives, "with a clause of renewal, provided lessee, his heirs, &c., should, within six calendar months from the death of the last of the said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as well all rent and arrears that should be due for the half-year after the fall of such life as the sum of 11*l.* 7*s.* 6*d.* for renewing or adding such life or lives forever," was sufficiently distinct to import a covenant for perpetual renewal. *Ib.*

2. *Rent — Specialty Creditor.*] By an instrument in writing, operating as an agreement for and not as a lease, A agreed to take, and B to grant, a lease of a sugar estate in Jamaica, for a certain term of years, at a certain rent. A died indebted to B, in respect of this rent. In a creditors' suit, instituted in the Court of Chancery in England for the administration of the estate of A:—

*Held*, affirming the decision of the court below, that B was not entitled to rank as a specialty creditor in respect of such rent. *Vincent v. Godson*, 558.

3. Rent due ranks as a specialty debt where the relation of landlord and tenant exists in respect of lands within the jurisdiction; and that, whether the demise be by writing or upon a constructive tenancy from year to year. But the doctrine being founded in privity of estate, will not apply where the lands, the subject of the demise, are out of the jurisdiction. *Ib.*

## LEASE.

*Covenant for Renewal.*] See LANDLORD AND TENANT.

## LIFE INSURANCE.

See INSURANCE.

## LIMITATIONS.

See *Scott v. Scott*, 5.

See *Stone v. Godfrey*, 318.

## MARRIAGE.

See *Stone v. Godfrey*, 318.

## MARRIAGE SETTLEMENT.

Upon the marriage of one of several residuary legatees under her father's will, the intended husband and wife assigned to trustees all and every the sum and sums of money, legacy and legacies, and other personal property then due and payable, or belonging to, or to become due and payable to the intended wife under or by virtue of her father's will, "or otherwise howsoever," upon trusts for her separate use for her life, without power of anticipation, with trusts in remainder in favor of the children of the marriage. By the next witnessing part of the same settlement, it was agreed, that in case any real or personal property should, during the coverture,

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be given or bequeathed to the wife, the husband should settle it upon trust, so that the wife should have the sole power of disposing of the same :—

*Held*, that a legacy bequeathed by another will to the wife after the marriage was not subject to the trusts for the children, the latter witnessing part of the settlement showing that the former must be read in a restricted sense. *Stephenson, Ex parte*, 487.

MONEY.

*Bequest of—what passes.*] *Lowe v. Thomas*, 238.

MORTGAGE.

1. *Equitable Mortgage.*] Where a person, at the same time that he gave a promissory note for money borrowed at 6l. per cent. interest, deposited title-deeds of land as a further security, and upon a further advance entered into a parol agreement with the lender to execute a mortgage of the same lands as a security for the whole amount at 5l. per cent.:—

*Held*, that although (as already decided by one of the Vice-Chancellors) the original deposit was not valid as being obnoxious to the usury law, 12 Anne, stat. 2, c. 16, yet that the parol agreement created a good equitable mortgage, notwithstanding that the deeds were not at that time and on that occasion delivered by the borrower to the lender, but had remained in the lender's possession from the time of the former transaction. *James v. Rice*, 342.

2. *Power of Sale.*] A mortgagor and a mortgagee with a power of sale joined in demising the mortgaged hereditaments to a receiver upon trust at the request of the mortgagee during the continuance of the security, and at the request of the mortgagor, after satisfaction of the sums secured, to grant leases of the premises in such manner as the person making such request should appoint, but to permit the mortgagor to receive the rents until default was made in payment of the mortgage-money or interest, and upon trust after default to receive the rents and apply the same in keeping down the interest upon the mortgage. These trusts were not declared to be subject to the power of sale in the mortgage :—

*Held*, that they were so in effect, and that the receiver was bound, without the concurrence of the mortgagor, to join in conveying the hereditaments to a purchaser from the mortgagee under the power of sale. *King v. Heenan*, 470.

3. *Priority.*] A widow who, under her marriage settlement and otherwise, was entitled to annual and other sums charged on her husband's estates, was one of the trustees of his will, whereby the estates were devised in trust to raise 2,000l., for her benefit, and subject thereto in trust to convey the estates as the testator's daughter by a former marriage should direct. The daughter borrowed money upon the security of a mortgage of some of the estates, in which the widow and her co-trustee joined, and whereby, after reciting the will and the agreement for the loan, and that the daughter had directed the widow and her co-trustee, to make such conveyance as was thereafter contained, the widow and her co-trustee as devisees in trust, by the direction of the daughter, conveyed the estates to the mortgagee upon trusts for sale and for payment of the mortgage debt, and of the surplus as the daughter should appoint, and subject thereto according to the trusts of the will :—

*Held*, 1. That the mortgage did not pass the beneficial interest of the widow. *Stronge v. Hawkes*, 541.

4. That, nevertheless, her charges must be postponed to the mortgage, she having concurred in it, without reserving her priority. *Id.*

5. *Of Part of a Ship.*] See SHIPS AND SHIPPING.

PARENT AND CHILD.

See INFANTS. *Stone v. Godfrey*, 318.

PARTITION SUIT.

*Form of Decree.*] The plaintiff in a partition suit was entitled to six sevenths of the estate, and had the title-deeds :—

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*Held*, that the proper form of decree, as to the documents of title, was for the delivery to the defendant of such of them as related exclusively to the land which should be allotted to him, and for the retainer by the plaintiff of the rest, he undertaking to abide by any order which the court might make as to the same, with liberty for either party to apply. *Jones v. Robinson*, 477.

## PARTNERSHIP.

1. *Surety of one Partner.*] Two persons entered into partnership, and one gave to the other the joint and several bond of himself and of another person as his surety, indemnifying the other partner from all loss from the partnership business. By the articles of partnership, it was to continue for five years, and it was agreed that if either partner should retire and the other continue the business, the latter might take the former's share of the assets at a valuation; and it was also agreed that if at the end of the partnership either partner should wish to carry on the business, and should not take the share of the other at the before-mentioned valuation, the assets should be realized, the debts paid, and the surplus divided between them. The partnership expired by effluxion of time, neither partner having retired. At the end of the term, the partners continued the partnership for a year and a half or more. The surety never was consulted on this proceeding, although he was cognizant that the concern had not been wound up at the end of the term. The partner (the obligee in the bond) retired, leaving the whole assets in the hands of the other to wind up the concern, and the partner (the obligor) three months afterwards became bankrupt and absconded with part of the assets, and the obligee partner paid off all the liabilities. The surety died, and the obligee partner sued his executor on the bond, and a bill was filed to restrain the action:—

*Held*, (overruling the decision of one of the Vice-Chancellors, who had dismissed the bill, with costs,) that as the partnership affairs had not been wound up at the end of the five years, pursuant to the stipulations of the deed, the surety and his estate were discharged from all liability on the bond, and a perpetual injunction was ordered to restrain all proceedings upon it as against the surety. *Small v. Currie*, 304.

2. *Rights of Executor of one Partner.*] A testator was a member of a partnership at will in a bank, without any provision entitling the executor of a deceased partner to an interest in the good-will of the concern. The credit, in which the bank was, rendered capital unnecessary, and at the testator's death the property of the concern exceeded its liabilities by a very small amount, the testator's share in which was far exceeded by the balance due from him to the bank on his private account, as a customer. After his death, the surviving partners admitted into the firm his son, who was his executor, but who was not admitted into the firm in that character, and the business continued to be carried on without any separation or appropriation of the partnership assets as they existed at the testator's death. In a suit against the executor for the administration of the testator's estate:—

*Held*, that he was not accountable to the testator's estate for the profits which he had received as a partner in the bank. *Simpson v. Chapman*, 523.

3. *Forfeiture of Shares.*] A lease of a mine was made to A. B. and two other persons, co-adventurers, who agreed to work it upon the cost-book system. Calls were made which A. B. did not pay, and his co-adventurers declared his shares forfeited. A. B. had not abandoned his right, but after three years he filed a bill, praying a dissolution of the partnership and for an account:—

*Held*, (affirming a decree of the Master of the Rolls) that there is no custom in mines worked on the cost-book system to forfeit shares for non-payment of calls without a special stipulation. *Hart v. Clarke*, 561.

4. *Dissolution of.*] *Held*, also, (reversing the decree of the court below,) that the partnership was not determined at the time of the declaration of forfeiture, and that the plaintiff was entitled to an account, and to the appointment of a manager and receiver, and that, the plaintiff having a legal interest in the mine, it could not be affected by the acts of his partners. *Ib.*

## PATENT.

*Scire Facias.*] After a judgment in *scire facias* in the Court of Queen's Bench, annul-

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ing letters-patent, and directing that they should be restored to the Court of Chancery to be cancelled, the Lord Chancellor has no jurisdiction to stay the execution of the judgment, his duty in cancelling the enrolment being only ministerial. *Regina v. Eastern Archipelago Co.* 548.

PENALTIES.

*Distinction between, and Liquidated Damages.*] See RAILWAYS.

PRACTICE.

1. *Examination of Party.*] Where, upon the hearing of a cause by a Vice-Chancellor, a tender by the defendant of himself to be examined orally as a witness for himself in the cause, with a view to his cross-examination by the plaintiff, had been refused by the plaintiff, this was

*Held*, by the Court of Appeal to be a sufficient ground for refusing to accede to an application by the plaintiff to have that course adopted upon the hearing of an appeal from the Vice-Chancellor's decree. *Hindson v. Wetherill*, 149.

2. *Receipt Stamp.*] It is not necessary to affix the penny receipt stamp on a brief where counsel signs his name, acknowledging the payment of the fee. *Beavan, In re*, 199.

3. *Oral Examination.*] The court of appeal has jurisdiction, under the 39th section of the statute 15 & 16 Vict. c. 86, to require the production and examination before itself of a party to a cause, although he may not have been orally examined in the court below.

The expression "upon the hearing," in the 39th section, means "whenever or wherever a cause is heard." *Hope v. Threlfall*, 241.

4. *Demurrer.*] Where a question had been decided in one suit, and the same point was raised between other parties in another suit, the court, upon appeal, declined to decide the case upon demurrer. *Evans v. Evans*, 343.

5. *Right to begin.*] Where an appeal is brought by a defendant against the whole decree, excepting as to costs, the plaintiff begins. *Senhouse v. Hall*, 350.

6. The words "at their respective places of business," in the second section of the 16 & 17 Vict. c. 78, are not to be construed as defining the place where the oath is to be administered, but the area within which the solicitors are to be considered as practising. *Clerk of Records, In re*, 399.

7. *Costs of Appearance.*] A solicitor was held entitled to charge 6s. 8d. for every three defendants to a bill for whom he entered appearances, although such appearances were entered for all the defendants on the same day. The scale of fees, as to entering appearances, set forth in the fifth general order of the 23d of October, 1852, was not intended to be confined to appearances to a summons. *Morrill v. Walton*, 400.

8. *Evidence — Costs.*] Where, under a decree directing accounts to be taken, no order was obtained under the 54th section of the statute 15 & 16 Vict. c. 86, that the books of account should be taken as *prima facie* evidence, but the judge's chief clerk so admitted them and granted his certificate, the Court of Appeal, upon a motion to discharge the certificate, refused the same, but without costs. *Newberry v. Benson*, 401.

9. *Seal Day.*] Although it is not the course of the court to hear special motions on other days than those appointed, yet, as every day in term is a motion day, a notice inserted in the Gazette, under the 79th order of May, 1845, for taking a bill *pro confesso* on a day in term, is a good notice, notwithstanding that the day for which notice is given is not a day regularly appointed for motions. *Chaffers v. Baker*, 552.

10. *Amendment.*] A plaintiff filed his bill, asserting a legal right, and at the hearing he was ordered to establish it at law. Before the trial, he alleged he had discovered circumstances which happened before he filed his bill, but of which he was not aware when he instituted the suit, and moved for leave to amend, under the 53d section of the 15 & 16 Vict. c. 86. The court, overruling a decision of one of the Vice-Chancellors, gave leave to amend. *Bolton v. Ridsdale*, 554.

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## PRINCIPAL AND AGENT.

See *Wing v. Harvey*, 140.

## PRINCIPAL AND SURETY.

1. *Release of Surety.*] A principal debtor joined with a surety in a joint and several promissory note to a creditor of the principal debtor, for securing the debt. The principal afterwards executed an assignment of property for the benefit of his creditors, containing a release by the creditors, but no reservation was contained of the creditor's rights against the surety. The creditor to whom the promissory note was given, executed the deed with the privy of the surety, and on the understanding, as shown upon the evidence, that his rights against the surety were not to be prejudiced thereby. The creditor to whom the note was given and two other creditors were the trustees of the deed, and those three persons were the only creditors of the principal who executed the deed. The principal debtor was adjudicated bankrupt, the act of bankruptcy being the execution of the deed. The surety had before committed an act of bankruptcy, and had been adjudged bankrupt. The commissioner refused to permit the holder of the note and trustee of the deed to prove against the estate of the surety; but upon appeal:—

*Held*, that he was so entitled, and the commissioner's decision was reversed. *Harvey Ex parte*, 272.

2. *Discharge of Surety.*] Two persons entered into partnership, and one gave to the other the joint and several bond of himself and of another person as his surety, indemnifying the other partner from all loss from the partnership business. By the articles of partnership, it was to continue for five years, and it was agreed that if either partner should retire and the other continue the business, the latter might take the former's share of the assets at a valuation; and it was also agreed that if at the end of the partnership either partner should wish to carry on the business, and should not take the share of the other at the before-mentioned valuation, the assets should be realized, the debts paid, and the surplus divided between them. The partnership expired by effluxion of time, neither partner having retired. At the end of the term, the partners continued the partnership for a year and a half or more. The surety never was consulted on this proceeding, although he was cognizant that the concern had not been wound up at the end of the term. The partner (the obligee in the bond) retired, leaving the whole assets in the hands of the other to wind up the concern, and the partner (the obligor) three months afterwards became bankrupt and absconded with part of the assets, and the obligee partner paid off all the liabilities. The surety died, and the obligee partner sued his executor on the bond, and a bill was filed to restrain the action:—

*Held*, (overruling the decision of one of the Vice-Chancellors, who had dismissed the bill with costs,) that as the partnership affairs had not been wound up at the end of the five years pursuant to the stipulations of the deed, the surety and his estate were discharged from all liability on the bond, and a perpetual injunction was ordered to restrain all proceedings upon it as against the surety. *Small v. Currie*, 804.

3. *Indemnity.*] A necessary consequence of a reservation in a composition deed of a creditor's remedies against a surety is the continuance of the surety's right to be indemnified by the principal debtor, and this right will not be held to be abandoned unless a contract to abandon it is proved. Therefore, where one of the creditors who acceded to a composition deed was also a residuary legatee of a surety for the compounding debtors to another creditor, and one of the compounding debtors happened to be the surety's executor:—

*Held*, that the residuary legatee's accession must be taken to have been in respect of his direct debt only, and did not preclude him from insisting on the surety's estate being indemnified by the debtors. *Close v. Close*, 535.

## RAILWAYS.

1. *Fraud in Contracts.*] In a contract between R. and a railway company, for the performance by R. of portion of the line of railway, after reciting that R. agreed to

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secure the due performance of his contract by his bond in the penal sum of 4,000*l.*, conditioned for the payment to the company of certain fixed sums for every week in which the work should not be completed according to the contract, the penalty in each successive week to increase in a fixed proportion, it was witnessed, amongst other things, that in case R. should become insolvent, &c., or should from any cause whatsoever (not the act of the company) not proceed in the works to the satisfaction of the company, the company might give to R. a notice in writing requiring him to proceed with the said works, and in case R. should for seven days after such notice make default in commencing or regularly proceeding with the said works, it should be lawful for the company to employ other persons to complete the works, and pay them out of the money which should be then remaining due to R. on account of this contract; and that the moneys previously paid to R. on account of any works should be considered as the full value, and be taken by him as in full payment and satisfaction, for all works done by him; and that all moneys which either then or thereafter would have been payable to R., together with all the tools and materials then being upon the works, should, upon such default as aforesaid, become and be in all respects considered as the absolute property of the company; and that if such moneys, tools, and materials should not be sufficient to pay for the completion of the works, then R. should make good such deficiency on demand. It was then further witnessed, and the company covenanted to pay to R. for the completion of the works the sum of 63,028*l.* 16*s.*, in the following manner, namely, every fourteen days four fifth parts of the whole value of the said works which shall have been actually performed during the preceding fourteen days, until there should be a reserved fund of 4,000*l.*, and then every fourteen days to pay the full value of such works, such value to be estimated by the principal engineer or his assistant, having reference as well to the prices in the schedule (as to extra work) as to the entire cost of the whole works; and at the expiration of one calendar month after the completion of the entire works, to pay one moiety of the 4,000*l.* so retained in the hands of the company, and at the expiration of one year and a month the remaining moiety of the 4,000*l.* And it was lastly agreed, that during the progress of the works the decision of the principal engineer for the time being of the company, with respect to the amount, state, condition, &c., or any other matter or thing whatsoever relating to the same, shall be final, and without appeal; but in case of dispute, after the completion of the contract, as to any matter of charge or account between the company and R., such dispute shall be finally settled by the arbitration of the said engineer on the part of the company, and an engineer appointed by R. on his part, or if they disagree, by an arbitrator to be named by them. After R. had proceeded to a very considerable extent towards the completion of his contract, the company, being dissatisfied with the progress of the works, gave the notice to R. mentioned in the contract, and after seven days they took possession of the works, and of all the tools and materials thereon, and completed the works by other parties. R. filed his bill setting up a case of fraud against the company in concealing the nature of the strata through which cuttings and tunnels were to be made, and insisting that he was entitled to be paid for those works at fair prices, regardless of the contract; that the fortnightly certificates of the value of the works given by B., the engineer of the company, were void, and not binding upon him, in consequence of B. being a shareholder in the company, that he was entitled to be relieved against certain money penalties which had been charged against him in the engineer's certificates; that the company were not justified in taking possession of the works, tools, and materials; and that he was entitled to have an account taken of the value of the works done, on the footing that there were no contracts, or that they were abandoned; and that the company might be debited with the value of the engines, tools, materials, articles, and things of which the company took possession:—

*Held*, first, that no case of fraud had been made out. But *semble*, that although a corporation cannot be guilty of fraud, yet if their agents employed in carrying out a trading speculation be guilty of fraud, the corporation will be liable. — Per the Lord Chancellor. *Ranger v. The Great Western Railway Co.* 35.

2. *Engineer a Shareholder.*] Secondly, that the principle which prevents a person being a judge in his own cause, (*Dimes v. The Grand Junction Canal Company*, 17 Jur. 73, s. c. 16 Eng. Rep. 63,) does not apply to the case of the engineer of a railway company holding shares in that company, who, according to the terms of a

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contract between the company and a contractor, was during the progress of the works to give periodical certificates of the value of the works done, but which on the completion of the contract were not final. *Ranger v. The Great Western Railway Co.* 33.

3. *Certificates of Engineer.*] *Semble*, it is not necessary to institute minute inquiries as to how far the engineer's calculations, in making out his certificates during the progress of the works, were accurate; it is enough if they were made *bonâ fide*, and with the intention of acting according to the exigency of the contract. — Per the Lord Chancellor. *Ib.*
4. *Penalties.*] Thirdly, that the money penalties had been properly charged against R., they being, upon the proper construction of the contract, not penalties, but liquidated damages. *Ib.*
5. *Equity.*] Fourthly, that even assuming that the company were not justified in taking possession of the works, tools, and materials after the notice given, R. was not entitled to treat the contract as not existing, or as abandoned. R.'s right would have been by action for damages, and the seizure by the company formed no ground for such equitable relief as was asked. *Ib.*
6. *Construction of Contract.*] Fifthly, that, upon the true construction of the contract, the company did not, according to their contention, upon taking possession of the works and plant after notice, become absolute owners of the tools and materials, &c.: this whole provision is to be regarded, not in the nature of a penalty, but as mere machinery for enabling the company to complete the works at the cost of R., and the company are bound to account for the value of the tools and materials in settling their accounts with him, which accounts were decreed to be taken on the footing of the contract. *Ib.*
7. *Alteration of Contract.*] As to one of the contracts, the company altered their intentions as to the direction which the line should take, and diverged, with the sanction of the land-owners, to greater extent than was permitted by their act of parliament; but the contractor never objected to the deviation, and continued to receive certificates and payment, in precisely the same mode as he would had the deviation not taken place: —  
*Held*, that these circumstances did not vary this contract from the preceding contracts. *Ib.*
8. *Purchase of Land.*] An annuitant having power of entry and distress, to secure his annuity charged upon certain leasehold houses, was served with notice by a railway company of their intention to buy. The company subsequently purchased the property from a prior mortgagee, who had a power of sale. The annuitant filed a bill, not containing any allegations of fraud, or other improper conduct on the part of the company in their purchase from the first incumbrancer, praying payment of the annuity and all arrears, or of the amount proper for the redemption of the annuity: —  
*Held*, reversing the decision of one of the Vice-Chancellors, that the plaintiff was not entitled, on such a bill, to the relief he asked, and it was dismissed. *Hill v. Great Northern Railway Co.* 198.
9. *Liability of Directors.*] Three directors of a projected railway company, with their letters of allotment sent to each allottee a letter saying: "In the event of the act not being obtained, the directors undertake to return the whole of the deposits, without deduction." The Master decided that the three directors who signed the letters were alone liable, and made a call on them accordingly for the expenses incurred. One of the three paid the whole, and then sought for contribution from the other five directors, who had not signed the letter: —  
*Held*, that the decision of the Master was correct, and that the three alone were liable. *Londesborough, Ex parte*, 292.
10. *Reinvestment for Land taken.*] Freehold and copyhold hereditaments were taken by a railway company, and the money paid into court: —  
*Held*, that the money could not be reinvested in leasehold property. *Macaulay, Ex parte*, 341.
11. *Retirement of Shareholders.*] By the deed of settlement of a joint-stock company no shares could be transferred without the consent of the directors. The company being

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unprosperous, and serious disputes existing, some of the shareholders agreed to pay a sum to the directors in full discharge of all their liabilities, which money was accepted, and transfers were made to two persons, and the shareholders retired. The directors applied the money partly in payment of claims of the lessors (who were also directors) of the property held by the company and partly in the payment of other claims, which were the subject of the disputes. The company having been ordered to be wound up, the Master placed the name of one of the retiring shareholders on the list of contributories, and the Master of the Rolls refused to remove him; and, on appeal, the decision of the Master and of the Master of the Rolls was supported, the agreement being *ultra vires*, the directors having no authority thus to sanction the retirement of a body of the shareholders. *Bennett, Ex parte*, 572.

See WINDING-UP ACTS.

## REVOCATION.

See WILL.

## SALE.

*Of Real Estate.*]

See STATUTE OF FRAUDS.

## SEA-SHORE.

*Right of Crown.*] The right of the crown to the sea-shore is limited by the line reached by the average of the medium high tides between the spring and the neap, in each quarter of a lunar revolution during the whole year. *Attorney-General v. Chambers*, 242.

## SERVICE.

*Substituted Service — when sufficient.*] See *Hope v. Hope*, 249.

## SHIPS AND SHIPPING.

*Mortgage by Part-owner.*] A was owner of seven eighths of a ship, and B was owner of the other one eighth; A mortgaged his share; A and B sent out the ship for a cargo at their joint risk in the same proportions as they had in the ship; the ship brought home a cargo, and then the mortgagee took possession, and claimed to be entitled to seven eighths of the proceeds of the cargo, without making any deduction for the expenses of the outfit and voyage. A had assigned all his property to a trustee for the benefit of his creditors:—

*Held*, (affirming a decree of the Master of the Rolls,) that the expenses of the voyage were to be paid out of the proceeds of the cargo before any division took place, and that B, the joint owner, was entitled to one eighth of the residue of the proceeds, the remaining seven eighths of the residue being payable to the trustee of A, to whom he had assigned his property, there being no contract between A and his mortgagee respecting the cargo. *Alexander v. Simms*, 288.

## SOLICITOR AND CLIENT.

1. *Solicitor's Bill.*] A solicitor delivered his bill to his client, and by letter informed him that payment might be postponed if taxation were intended. The client gave the solicitor security for the bill, but no money was paid in respect of it:—

*Held*, that this was payment within the meaning of the 41st section of the 6 & 7 Vict. c. 73, (the Attorneys and Solicitors Act.) *Turner, Ex parte*, 555.

2. The client joined in the transfer of the security so given, and in the commencement of other matters employed the same solicitor, and in their completion employed another solicitor, and paid the second bill of costs:—

*Held*, that these were not special circumstances to justify the taxation of the bill of costs. *Ib.*

3. Unless overcharge amount to fraud, the court will not refer bills of costs for taxation after payment. *Ib.*

4. *Bequest to Solicitor, when valid.*] See *Hindson v. Wetherill*, 149.

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- contract between the company and a contractor, was during the progress of the works to give periodical certificates of the value of the works done, but which on the completion of the contract were not final. *Ranger v. The Great Western Railway Co.* 35.
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  4. *Penalties.*] Thirdly, that the money penalties had been properly charged against R., they being, upon the proper construction of the contract, not penalties, but liquidated damages. *Ib.*
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SHIPS AND SHIPPING.

*Mortgage by Part-owner.]* A was owner of seven eighths of a ship, and B was owner of the other one eighth; A mortgaged his share; A and B sent out the ship for a cargo at their joint risk in the same proportions as they had in the ship; the ship brought home a cargo, and then the mortgagee took possession, and claimed to be entitled to seven eighths of the proceeds of the cargo, without making any deduction for the expenses of the outfit and voyage. A had assigned all his property to a trustee for the benefit of his creditors:—

*Held*, (affirming a decree of the Master of the Rolls,) that the expenses of the voyage were to be paid out of the proceeds of the cargo before any division took place, and that B, the joint owner, was entitled to one eighth of the residue of the proceeds, the remaining seven eighths of the residue being payable to the trustee of A, to whom he had assigned his property, there being no contract between A and his mortgagee respecting the cargo. *Alexander v. Simms*, 288.

SOLICITOR AND CLIENT.

1. *Solicitor's Bill.]* A solicitor delivered his bill to his client, and by letter informed him that payment might be postponed if taxation were intended. The client gave the solicitor security for the bill, but no money was paid in respect of it:—

*Held*, that this was payment within the meaning of the 41st section of the 6 & 7 Vict. c. 73, (the Attorneys and Solicitors Act.) *Turner, Ex parte*, 555.

2. The client joined in the transfer of the security so given, and in the commencement of other matters employed the same solicitor, and in their completion employed another solicitor, and paid the second bill of costs:—

*Held*, that these were not special circumstances to justify the taxation of the bill of costs. *Id.*

3. Unless overcharge amount to fraud, the court will not refer bills of costs for taxation after payment. *Id.*

4. *Bequest to Solicitor, when valid.]* See *Hindson v. Wetherill*, 149.

See ATTORNEY.

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## SPECIFIC PERFORMANCE.

1. *Vague Conditions of Sale.*] An annuity was granted for the lives of four persons, and the lives and life of the survivors and survivor of them, secured by a term in a reversion of a freehold estate, and the reversion was offered for sale. One of the conditions of the sale was, that certain evidence that "a life annuity granted to" A. B. had not been paid or claimed for twenty years, should be conclusive evidence that the annuity and term had determined:—

*Held*, affirming a decision of one of the Vice-Chancellors, that the condition was not binding, as the condition was one so worded as to lead a purchaser to a definite conclusion contrary to the real facts of the case. *Drysdale v. Mace*, 193.

Where the court requires for its own information the production of a record from the record office, no fee ought to be paid for the same. *Id.*

2. *Mutual Covenants.*] By indenture of dissolution of a partnership, the defendant, in consideration of the covenant therein contained on the part of the plaintiff, assigned to the plaintiff certain shares in a foreign gas company, which by the deed were recited to pass by the delivery of the certificates, and covenanted with him for further assurance; and by the same indenture the plaintiff, in consideration of such assignment, covenanted to indemnify the defendant against certain partnership debts. Upon the execution of the deed the certificates of the shares were handed over to the plaintiff, but certain formal acts required to be done by the law by which the company was regulated, before the property in the shares could be effectually vested in the plaintiff, were not performed:—

*Held*, that inasmuch as, upon the construction of the whole deed, the plaintiff's covenant of indemnity and the defendant's covenant as to the shares were legally independent of each other, a breach of the covenant of indemnity by the plaintiff, subsequent to the execution of the deed, did not constitute a ground of defence to a bill by the plaintiff for the specific performance by the defendant of the covenant for further assurance, by performing the formal acts necessary to be done in order effectually to vest the property of the shares in the plaintiff. *Gibson v. Goldsmid*, 588.

## STAMP.

*Order.*] A, being entitled to the sum of 365*l.* payable to him by B, addressed the following note to B: "I hereby authorize you to pay to C the sum of 365*l.*, being the amount of my contract:—"

*Held*, that this document did not require a stamp, as "an order for the payment of a sum of money out of a particular fund," &c., in the schedule to the 55 Geo. 3, c. 184. *Diplock v. Hammond*, 202.

## STATUTES CITED, &amp;c.

22 & 23 Car. 2, c. 10 (Statute of Distributions)	349
3 & 4 Will. 4, c. 105 (Dower Act)	182
4 & 5 Will. 4, c. 40, s. 12, (Friendly Societies Act)	190
15 & 16 Vict. c. 86 (Chancery Amendment Act)	241

## SURETY.

See PRINCIPAL AND SURETY.

## TENANTS IN COMMON.

See *Pryce v. Bury*, 178.

## TIDES.

See SEA-SHORE.

## TIMBER.

*Power to cut, in a Will.*]

See WILL.

Chancery.

TRINITY COLLEGE.

The Regius professorships of Divinity, Greek, and Hebrew, were founded and endowed in the University of Cambridge, by King Henry VIII., antecedently to the foundation of Trinity College, and the lands on which the endowment was charged were afterwards granted to the college, which thenceforward became bound to pay the stipends of the three professors. By the 41st of the statutes granted by Elizabeth to the college, it was provided that any fellow of Trinity College, on being elected to any one of the professorships, "*Socii nomen solum teneat.*" By letters-patent of Charles II., this disabling provision was annulled, so far at least as related to the Greek and Hebrew professorships. By the act 3 & 4 Vict. c. 113, the canonry of Ely was annexed to the Regius professorship of Greek; and in 1844, her Majesty, by letters-patent, and at the instance of Trinity College, granted a new code of statutes to the college, which, after reciting the statutes given to the college by Elizabeth, but not adverting by name to the letters-patent of Charles II., revoked "all statutes, ordinances, and decrees made and given for the government of the college;" and among the new statutes, the 41st of Elizabeth was enacted in the same terms. In 1853, one of the junior fellows of the college accepted the office of Regius Professor of Greek, and was subsequently elected a senior fellow:—

*Held*, that, by the acceptance of the office of Regius Professor, he ceased to be a fellow, except in name only, and that his election as a senior fellow was void. *Edleston, Ex parte*, 439.

TRUSTEE.

1. *Acceptance of Trusts.*] Where a trustee accept the trusts of a fund, with the knowledge that it is doubtful whether it ought to be held upon such trust, he is nevertheless entitled to come to the court for its direction whether the trusts ought to be executed:—

*Held*, by Turner, L. J.; Knight Bruce, L. J., entirely dissenting. *Neale v. Davies*, 301.

2. Where trustees accept such a trust, with knowledge of the doubt, and with the same and no more knowledge, are called upon to part with the fund, by the *cestui que trust*, they are bound in morality to do so; and an adverse claimant would have no claim against them personally after they had parted with the fund in conformity with the trusts on which they accepted it—per Knight Bruce, L. J. *Ib.*

3. The question having been raised in a suit between the trustees and *cestui que trust* of the deed, one of the Vice-Chancellors refused to pronounce a decree, but ordered the cause to stand over, with liberty to the plaintiff, the *cestui que trust*, to amend, by adding parties; and their lordships differing in opinion, the order of the court below was affirmed. *Ib.*

4. *Bar by Lapse of Time.*] A father claiming to be tenant by the curtesy of land belonging in equity to his deceased wife, filed a bill in 1826, as next friend of his daughter for partition. In 1830, a decree was made and partition ordered, and in 1838, the court directed the daughter's share to be conveyed to the father for a term until she came of age, upon trust to pay the rents for her maintenance, and the conveyance was so made. Before that bill was filed, the father was advised that he had no claim as tenant by the curtesy, and on the conveyance he was advised by other counsel, that he had, though this opinion was afterwards retracted. The first and second opinions were communicated to him. He performed the trusts until the daughter came of age, and after that time he accounted for the rents to her. In 1847, she married, and on her and her husband bringing ejectment against the father in 1852, he filed a bill claiming to be tenant by the curtesy, but the claim was dismissed by one of the Vice-Chancellors, and he appealed from the decree:—

*Held*, that the plaintiff having entered as trustee for his daughter had held the land as trustee after she attained twenty-one, and could not set up that possession as his own; that the lapse of time between the decree of 1830, and the filing of the bill in 1852, was a bar; that the daughter having married on the faith of the father's representation that the estate was hers, he could not disturb her title, for although the court will relieve against mistake in law, yet here the father three years after the decree had his attention brought to the state of his own title, and still continued to treat the title of the daughter as paramount to his own. *Stone v. Godfrey*, 318.

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5. *Liability of.*] A testatrix bequeathed her residuary estate upon trust for her sister for life, and after the sister's death to pay, divide, and apply the trust fund in manner following, (that is to say,) one tenth to or for the use of R. H., and another one tenth to or for the use of C. R., for their respective lives, and in case either of them should die in the lifetime of the tenant for life or afterwards, leaving lawful issue, then the testatrix directed that the part of him or her so dying leaving lawful issue should go to and be equally divided among his or her children as they should attain twenty-one:—
- Held*, that a child of C. R., who survived the tenant for life and attained twenty-one, but died in the lifetime of C. R., took a vested interest. *Boulton v. Beard*, 421.
6. The trustee of the will, who, acting on the opinions of counsel, had distributed the whole estate according to a different view, was ordered to pay to the representatives of the child the amount of the child's share and the costs of the suit. *Id.*
7. *Costs of.*] The grantor of an annuity, which was the third incumbrance on his real estate, executed a trust-deed (to which the annuitant was not a party) whereby the estates were conveyed to trustees on trusts for sale to discharge the incumbrances according to their priorities; and the first trust of that deed was to pay the costs of the trustees in the conduct of the sale. After the execution of the trust-deed, the trustees applied to the annuitant for his consent to the sale. In answer to that application, the solicitors of the annuitant offered to facilitate the sale, but asked for a copy of the trust-deed, adding: "When we have seen the deed, we shall be better able to inform you whether our clients will have any difficulty in joining in the conveyances." And, in answer to a subsequent application, they assented to the appropriation of a part of the rents towards rendering the property more eligible for sale. Part of the property was sold, the annuitant concurring in the sale, whereby a sufficient sum was realized to pay the prior incumbrances; but it being apprehended that the residue of the property would not realize enough to pay both the costs of the trustees and to redeem the annuity, the trustees applied to the annuitant for leave to retain, in the first place, out of the future proceeds of sale, a sum sufficient to pay their costs. This being refused, and a bill being filed to compel the annuitant to join in the conveyances:—
- Held*, under the circumstances, that he was not bound to do so, except upon the terms of having the annuity redeemed. *Crosse v. The General Reversionary and Investment Co.* 424.

## TRUSTS.

See CHARITABLE BEQUEST.

## USURY.

See *James v. Rice*, 342.

## VAGUENESS.

See SPECIFIC PERFORMANCE.

## VENDOR AND PURCHASER.

1. *Limitations — Adverse Possession.*] A. being the owner in fee of estate K. and other estates in Ireland, subject to a mortgage in fee, by a deed of February, 1807, which upon the face of it was for valuable consideration, purported to convey these estates to trustees in fee, upon trust for himself for life, remainder to his eldest son B., (then unmarried,) for life, remainder to B.'s first and other sons in tail male, &c. In June, 1807, A. and B. by deed, which on the face of it did not appear to be for value, purported to convey estate K. to trustees in fee, upon trust for A. for life, remainder to W. a younger son of A., for life, remainder to W.'s first and other sons in tail male, thereby, in effect, treating the previous deed as cancelled. A. died in 1808, when W. entered into possession of estate K., and either he or the appellant, J., his eldest son, had remained in possession ever since. In 1811, the mortgage was paid off by B., and the legal fee in estate K. was conveyed to him. In 1815, W. married, upon which occasion estate K. was made the subject of settlement. In 1837, B. died, leaving the respondent, J. B., his eldest son, his heir at law and in

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tail. In 1844, J. B. claimed estate K. under the deed of February, 1807, and brought his ejectment against J., but failed, the judge who tried the case being of opinion, and so directing the jury, that the plaintiff was barred by the Statute of Limitations and the twenty years possession of the defendant. *Scott v. Scott*, 5.

2. *Conditions of Sale.*] Where there is a condition of sale, that "if from any cause whatever" the purchase shall not be completed by a certain day, the purchaser shall pay interest, and delay take place which is occasioned by the state of the title, and is not wilful, the purchaser is not discharged from the payment of interest; but where the first abstract was not a complete abstract, the court gave interest only from the same period after the complete abstract was delivered as was equal in duration to the time which, by the contract, was allowed to elapse between the delivery of the abstract and the day wherefrom interest was to be paid. *Sherwin v. Shakespeare*, 358.
3. *Specific Performance.*] In a suit for specific performance, instituted by a vendor, who has remained in possession, it is unusual and improper (unless in a special case) in decreeing specific performance to direct in the account of rents and profits that the vendor shall be charged with rents and profits which, but for wilful default, he might have received. In such a decree it is irregular, excepting upon a special case, to direct the allowance to the vendor for expenses of lasting repairs, or of income tax in respect of such part of the property for which the vendor is charged an occupation rent. *Ib.*
4. *Specific Performance.*] The executrix of a lessee agreed to sell to A, the residue of her term (except a day) and the fixtures on the premises for 400*l.* This agreement was entered into by the executrix without advice, and there was no written memorandum of it except a letter written by the executrix to her own solicitor a few hours afterwards. Subsequently the landlord, knowing that there had been a negotiation, if not an agreement, between the executrix and A., agreed with her for the purchase of the residue of the term for 550*l.* A., on hearing of this, offered the executrix, if she would complete her contract with him 1,000*l.* as purchase-money, and indemnity against any proceedings on the part of the landlord. She accepted the offer, and demised the premises to A., for the whole term wanting a day:—  
*Held*, 1. That the original agreement (if any) with A., was such in its nature and circumstances as not to be of any validity in equity, unless the price was shown to be equal or more than equal to the value of the property. *Goodwin v. Fielding*, 513
5. 2. That as this was not shown, the landlord was entitled to a specific performance of his agreement, not only against the executrix but against A. *Ib.*
6. *Statute of Frauds.*] *Quere*, whether the letter to the solicitor was a sufficient memorandum in writing within the meaning of the statute of frauds. *Ib.*

See SPECIFIC PERFORMANCE. STATUTE OF FRAUDS.

WAIVER.

*Of a Breach of Contract.*] See *Wing v. Harvey*, 140.

WARDS OF COURT.

See INFANTS.

WASTE.

*Permissive.*] A court of equity will not interfere to make a tenant for life liable in respect of permissive waste. *Powys v. Blagrove*, 568.

WILL.

1. *Devise of a Manor.*] By the marriage settlement of Mrs. B., the manor of W. with the appurtenances, and other real estate, were conveyed to trustees, upon such trusts as Mrs. B., should, by will, appoint, and in default upon the trusts therein mentioned. The trustees, under the powers of the deed, purchased lands, copyhold of the manor of W. which were surrendered to them accordingly; and these lands were, in the

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lifetime of Mrs. B., thrown into one farm with other lands, not part of the manor, and let together under one demise. Mrs. B. died in 1813, having by her will appointed all her manor of W. to R. H. for life, with remainder to his first and other sons in tail male, and having appointed the residue of her real estate to trustees upon trust to sell. In 1814, the trustees of the will, presuming the purchased copyholds to have passed under the devise of the residue, sold them to R. B., who continued in possession until his death in 1835; and in 1837, R. B.'s devisees sold them to the defendant S. R. H. the tenant for life, died in 1828, leaving two infant sons, R. H., who died in 1831, a minor, and W. H. H., the plaintiff. In October, 1849, W. H. H. attained his majority, and, in December, 1850, filed his bill against S. and others, claiming the purchased copyholds as being included in the devise of the manor of W.:—

*Held*, upon appeal, affirming the decision of the court below, that, there being nothing in the will absolutely inconsistent with such a construction, the word "manor" must have its legal effect, and S. was decreed to reconvey to the plaintiff. *Hicks v. Saltit*, 212.

*Infant.*] *Held*, also, that the purchasers, having notice of the will, could not be held to have had a *bonâ fide* adverse possession; and that the plaintiff, being an infant at the time his title accrued, and having asserted his rights without laches, was entitled to an account of the rents and profits from the time his title accrued. *Ib.*

For the purpose of construing a testamentary appointment, the court is entitled to look at the instrument creating the power, the two constituting at law but one instrument. *Ib.*

2. *Solicitor and Client.*] Where a testator makes a disposition by his will in favor of the solicitor employed by him to make the will, in such language and under such circumstances as that upon the trial at law of an issue *devisavit vel non*, brought by the heir at law of the testator, or upon the hearing by the ecclesiastical court of a suit touching the validity of the will, the disposition in question would be upheld, this court will not, on the mere ground that the relation of solicitor and client existed between the solicitor and the testator, interfere, at the instance of the heir at law or next of kin, to fix a trust for the benefit of either of them upon the property devised or bequeathed to the solicitor. *Hindson v. Wetherill*, 149.

3. *Bequest of Money.*] A testatrix gave to A. B., "the whole of my money" for his life, at his death to be divided between C. D. and E. F., and after giving her clothes, watch, and trinkets to C. D., and E. F., declared that the longest survivor of C. D., and E. F., was "to become possessor of the whole money." At her death, the testatrix was entitled to sums of stock, and to some small sums of money:—

*Held*, that the sums of stock did not pass to C. D., and E. F., under the above bequest. *Lowe v. Thomas*, 238.

4. *Power to cut Timber.*] A testator, after devising specific real estate, devised all the residue of his estate to trustees for ninety-nine years, without impeachment of waste; and, subject thereto to his son W. for life, without impeachment of waste; remainder to his granddaughter C., for life, without impeachment of waste; remainder to her issue in strict settlement. The trusts of the term were to raise money by mortgage or sale of the premises comprised therein. The will contained a proviso that no part of the timber upon the residue of his real estate should be cut until his granddaughter attained twenty-one, at which time his trustees were to cut such timber as they should think fit, and pay the proceeds to his granddaughter for her sole use. In 1835, W. died, and in 1836, the granddaughter attained twenty-one, and died in 1842, leaving an only child and her husband surviving her, the trustees not having exercised the power of cutting timber. In 1843, the term was sold for the purposes of the trust:—

*Held*, that the purchaser was entitled to the timber standing upon the estate at the time of the sale. *Wallington v. Wallington*, 281.

5. *Construction—Distribution.*] A testator gave his personal estate to trustees upon trust for his daughters, for their respective lives, in equal shares; and if any died without issue their shares were to be held in trust for the person or persons who would at their death respectively be entitled, as next of kin or otherwise, to their respective personal estate under the statutes made for the distribution of intestates' effects, and in the same proportions and manner as they would be entitled by virtue

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of such statutes if they had then respectively died intestate. One of the daughters died without leaving any child surviving:—

*Held*, that her husband was not entitled to her share. *Milne v. Gilbert*, 344.

6. *Revocation.*] A testator entitled in reversion to copyhold hereditaments and in possession to freehold hereditaments, by his will devised and bequeathed all the freehold, leasehold, and copyhold estates devised by the will of his late father and also all his estates, freehold, leasehold, or copyhold, to his wife for her life or widowhood; and after her decease, or second marriage, he devised the same to A, B, and C, three of his children, their heirs, executors, administrators, and assigns, forever. By a later will, which commenced with the words: "This is my last will and testament," the testator gave the whole of his real and personal estate to his wife, for life, and after her decease he gave all his property, personal estate, and effects to all his children equally, except his eldest son:—

*Held*, that the second will did not revoke the devise of the copyhold estate contained in the first will. *Freeman v. Freeman*, 351.

7. *Issue — Annuity.*] A testator gave an annuity of 600*l.*: "to A for her life, and the issue from her body lawfully begotten; on failure of which, to revert to my heirs; and I request B and C to act as my trustees for A, so that the said annuity may be secured for her separate use:—"

*Held*, that A was entitled for life only to the annuity, with remainder to her issue. *Wynch's Trust*, 375.

8. In a will, the word "issue" is not a technical expression implying, *primâ facie*, words of limitation, but will yield to the intention of the testator to be collected from the words of the will. *Ib.*

9. Assuming the word "issue" to have been a word of limitation, A's life estate would not have coalesced with the estate in remainder, as the one estate was equitable and the other legal. *Ib.*

10. *Vesting.*] Testatrix, by her will, gave her residuary estate to trustees to invest and pay the dividends to A for life; and after his decease, in case he should leave a child or children, in trust for all and every such child or children equally at twenty-one, the share of each such child to be considered a vested interest in him or her, and, in case A should leave no such child or children, the will contained a gift over to third parties. A, had one child, H. E. F., who attained twenty-one, and died in his father's lifetime, leaving a widow and child surviving him. On a suit by the widow of H. E. F. claiming, as his administratrix, that he was absolutely entitled to the fund:—

*Held*, upon appeal, affirming the decision below, that the persons claiming under the gift over were entitled. *Bythesea v. Bythesea*, 402.

11. *Priority of Legatees.*] A testator, after bequeathing two pecuniary legacies, bequeathed three "clear" annuities for the lives of the annuitants. He then bequeathed his residuary estate in trust to pay a clear annuity of 1,000*l.* to his widow, and upon trust, after payment of the four annuities, to pay the residue of the income during the life of the widow to A. The capital of the residue, after the widow's death, was to be held as to 5,000*l.*, upon such trusts as the widow should appoint, and subject to her appointment the 5,000*l.* was to be held in trust for B, for life, and after her death to fall into the general residue, and subject to such disposition as aforesaid; and as to the residue of the testator's estate and effects after the widow's death, and subject as to the 5,000*l.* and the interest thereof as aforesaid, upon trust to pay certain legacies amounting to 18,000*l.*, with an ultimate residuary gift to E. And there was a direction that, upon the death of the several annuitants, the funds on which the annuities were secured should follow the ultimate destination of the residue:—

*Held*, 1. That the two first-mentioned pecuniary legacies and three annuities had priority over every other gift.

2. That the annuities were given free of legacy duty.

3. That the annuities were charged on the capital of the residue, but that A was entitled to retain the surplus income paid to her in one year, and to receive the surplus for another, although the income was in the subsequent years insufficient to answer the annuities.

## Chancery. A

4. That on the death of an annuitant in the lifetime of the widow, the ultimate residuary legatee did not become at once entitled to the fund set apart to answer the annuity.
5. That after the widow's death, the 5,000*l.* would have no priority over the other reversionary legacies.
6. That the reversionary legatees were not entitled to have any surplus income during the widow's life, set apart to secure payment of their legacies. *Haynes v. Haynes*, 410.
12. *Annuities.*] By a will commencing thus: "I give and bequeathe the several legacies and annual sums following," a testatrix bequeathed pecuniary legacies and an annuity, and directed two sums of money to be set apart sufficient to produce two other specified annual sums, which the testatrix bequeathed to two specified persons for their respective lives. She gave to trustees the residue of her personal estate, subject to the payment of her debts, funeral and testamentary expenses, and the legacies and annuities which she had bequeathed or might thereafter bequeathe by any codicil. And she devised her real estates to trustees for a term, upon trust to raise sufficient to pay her debts, legacies, and funeral and testamentary expenses, but directed that her personal estate should be the primary and the term the secondary fund for payment of her debts, legacies, and funeral and testamentary expenses:—  
*Held*, that the separate specification of "annuities," in some parts of the will, did not prevent annuities from being comprehended under the expression "legacies" in the trusts of the term. *Heath v. Weston*, 417.
13. *Probate of.*] The Ecclesiastical Court granted probate of a will of personalty, with cross lines drawn in ink over the bequests of certain legacies:—  
*Held*, on a claim raised by the parties interested in these legacies, that the will must be taken to have been executed after the cross lines were drawn, and that the only question was, what was the meaning of the testator, and that this was, that the legacies were not to stand as part of the will. *Gann v. Gregory*, 459.
14. *Construction.*] A testator gave his residuary estate upon trust to pay to A an annuity during her life, and to accumulate the surplus income till the expiration of six months after A's death, and then to divide the residue and accumulations into as many shares as there should be children "living" of A and of B, who should have lived to attain twenty-one, or, in case of any of them being dead under that age, who should have left issue, and pay and apply one share to each of the children of A and B, that should have lived to attain twenty-one, and to their respective executors, administrators, and assigns, and one share to the issue of each child who should have died under that age, leaving lawful issue:—  
*Held*, that the word "living" was not referable to the period of distribution, but to that of the testator's death; so that each child, on attaining twenty-one, took a vested interest absolutely. *Kidd v. North*, 479.
15. *Construction of.*] See CHARITABLE BEQUEST. TRUSTEE.
16. *Construction—Election of Dower.*] See *Parker v. Sowerby*, 154.
17. *May be established in Equity, when.*] See JURISDICTION.

## WINDING-UP ACTS.

1. *Solicitor's Bill.*] A company was completely registered. On a proceeding under the winding-up acts, the solicitor who had been employed in its formation carried in before the Master his bill for the whole expenses incurred, both those preliminary to the registration of the company and those incurred subsequently to that period. The Master only allowed the bill as a claim, and gave the solicitor liberty to proceed by action as he might be advised:—  
*Held*, that this course was erroneous. That the winding-up acts embraced both equitable and legal claims; and that, as there was no doubt of the retainer and employment of the solicitor, the bill ought to have been allowed as a debt, but subject to taxation. *Terrel v. Hutton*, 1.
2. *Practice under Stay of Proceedings.*] The circumstance that an order goes beyond the notice of motion on which it is made, however immaterial as between those who have appeared and taken part in the discussion upon the motion, is not so as to those

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parties interested in the subject-matter of the motion, who, being served with notice thereof, did not appear thereon, for these are entitled to rest on their right to assume that nothing beyond what is contained in the notice will be asked upon the motion. Therefore,

Where, in the course of the proceedings under an order for winding up the affairs of an abortive railway scheme under the Windings-up Act, the Master to whom the matter was referred had made a call upon a portion only of the persons whose names had been settled on the list of contributories to the liabilities of the concern, on the ground that that portion were the parties primarily liable; and motions were made by some of those parties, by way of appeal, that such order might be discharged or varied, and that the names of the parties so primarily charged might be struck off the list of contributories, notices of which motions were served upon all the contributories on the list; and, upon the hearing of such motions, the Vice-Chancellor, being of opinion, upon the evidence, that no such company or association had in fact been constituted, made an order, not only discharging the call in question, but also staying all proceedings under the winding-up order, and directing the official manager to repay all sums received by him thereunder to the persons respectively from whom he had received them:—

*Held*, upon appeal from the Vice-Chancellor's order that inasmuch as none of the parties served with the notices of motion had not appeared upon such motions either before the Vice-Chancellor or before the Court of Appeal, and inasmuch as the creditors who had proved debts under the winding-up order, not having been served, were also absent, the order staying all proceedings under the winding up order could not stand, and that therefore the Vice-Chancellor's order should be discharged *in toto*; but that, inasmuch as the materials before the court did not appear sufficient to support the Master's order for a call, there should be substituted for the Vice-Chancellor's order so discharged a simple order discharging that made by the master for a call, and giving all parties their costs out of the estate. *Chancery, 1874, 1875.*

3. *Advances by Directors allowed.* By the deed of settlement of an unincorporated mining company, the capital of the company was to be £10,000, and it was provided that the affairs and business of the company should be under the entire control of the directors. The deed empowered the directors, if they thought it desirable, to create new shares by vote at a special general meeting. New shares were accordingly created, but the capital arising from these, as well as the original capital, having been exhausted, certain of the directors, and a shareholder, not a director, joined in borrowing money for the company from the bankers of the company, giving, however, at the same time, their personal guarantee to the bank for repayment, and the sum so borrowed was then applied by the directors in payment of debts and expenses necessarily incurred in properly working the mine. After an action had been obtained to wind up the affairs of the company under the winding-up Act, the bank took in a claim for the sum so lent before the Master, by whom it was allowed: but on appeal to the court the claim was directed to stand over giving liberty to the bank to bring their action for their alleged debt, if any amount was due to them from the company. The bank then brought their action accordingly, in which they were unsuccessful, the court of law being of opinion that the loan by the bank to the directors for the company could not be treated as a charge upon the company: but only as a personal loan to the directors and shareholders who had not signed it: and thereupon the Master's order allowing the claim of the bank was discharged. The bank then obtained payment of the sum advanced from the directors and shareholders upon whose guarantee they had been advanced, and then claimed it to be allowed the money so recovered from them by the bank when the Master's allowance made to them in the company.

*Held*, upon appeal from the Vice-Chancellor's decision, allowing to the bank the certificate allowing the claim, that inasmuch as the directors were not members of the company and the evidence showed that the advances in question had been advanced to them for the purpose of enabling them fully to discharge their duty, they were entitled to the indemnity usually extended to trustees in such cases and to a refund hereof without any deduction therefrom in respect of money so advanced, unless the bank or the company given to them by the bank or either of them.

4. *Bill*. A person making a claim as creditor against a company interested in a mine.

## Chancery.

up was, after various proceedings, allowed to bring an action against the official manager, and recovered judgment for the amount and costs. The order permitting the action directed that the judgment, if any, should be dealt with as the court should direct. The creditor applied for leave to issue proceedings at law or in equity against the property of the company, or against the contributories, or that the official manager might make a call for payment of the demand :—

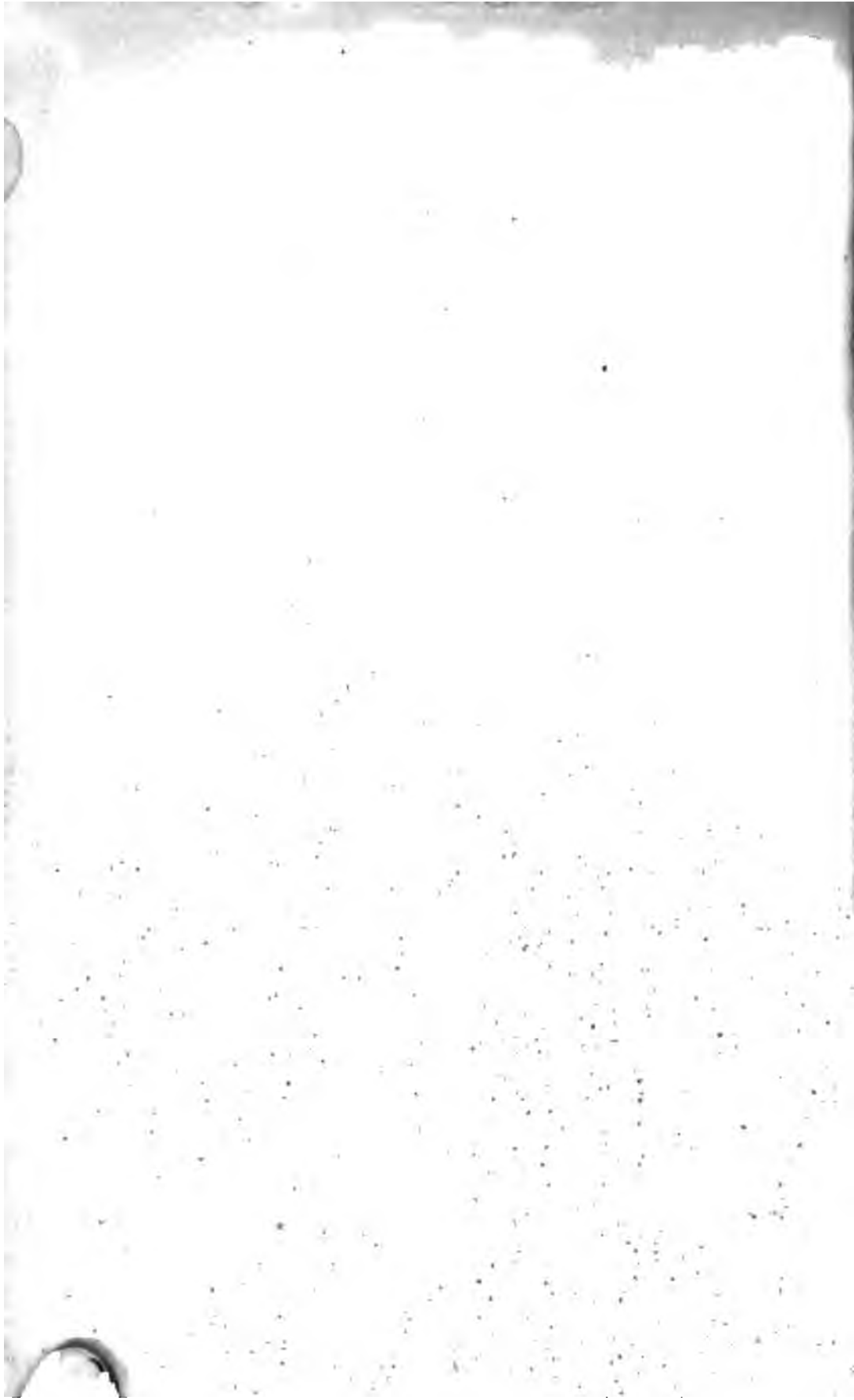
*Held*, (overruling a decision of one of the Vice-Chancellors, who had refused to make any order,) that he was entitled to proceed at law; but that the court would not make a call, as such an application must be made in the Master's office. *Prichard, Ex parte*, 372.

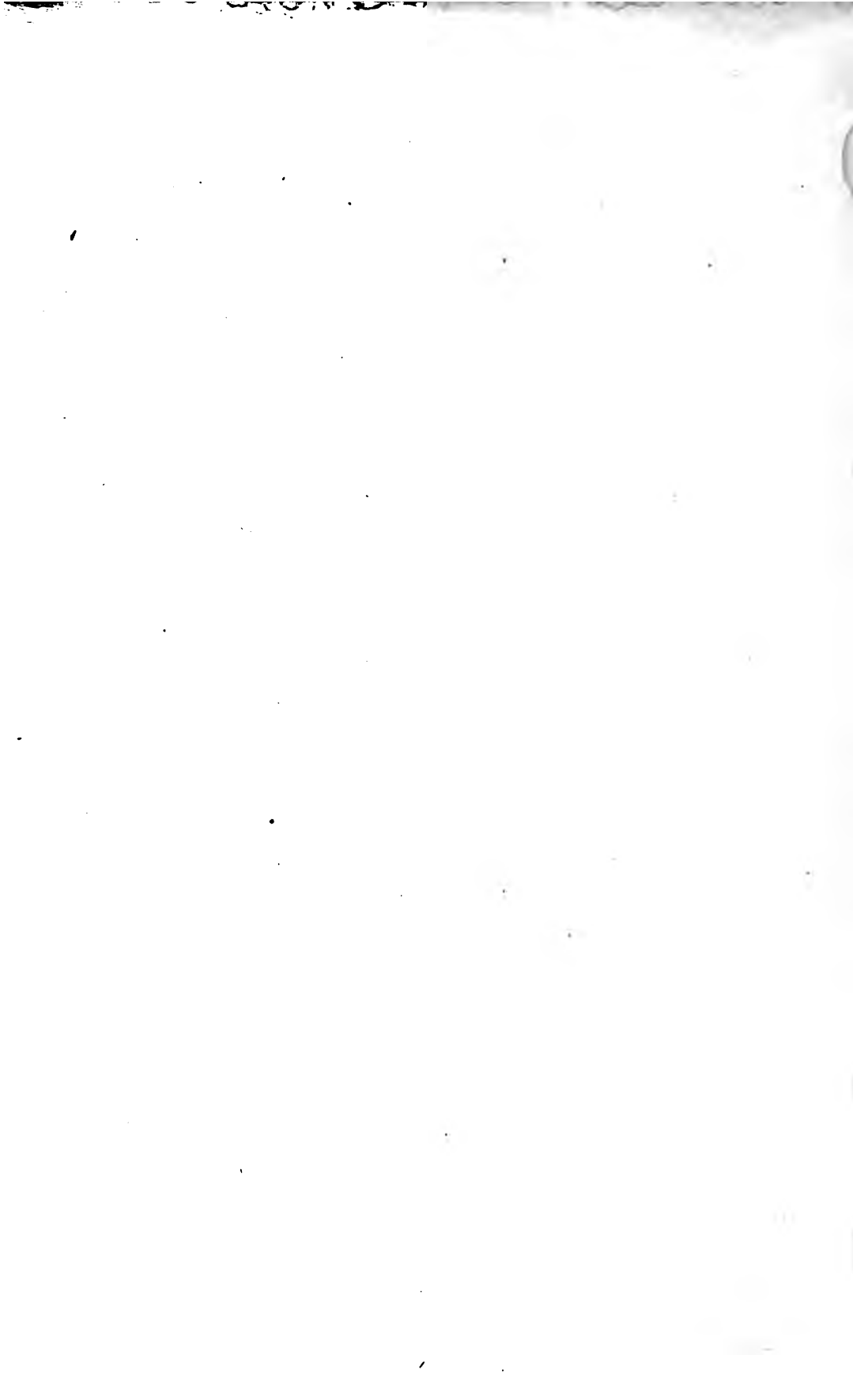
5. *Contributory — Calls.*] An order was made for winding up an abortive railway scheme. A list of contributories was prepared, but it contained the word "adjourned" written in pencil against some names. Six persons were comprised in the names on this document. The Master made a call upon the six, and, against the consent of the official manager, compromised the liabilities of five of these persons by payment of a stated sum each. The sixth person was a managing committee-man, and although he at one time denied his liability before the Master, he ultimately consented to remain. He then gave two notices of motion, one to remove his name from the list, and the other to discharge the order for a call, or that the compromise might be set aside. One of the Vice-Chancellors considered that the order to wind up could not be sustained, as there was, in fact, no company to wind up, and, therefore, he discharged the order for the call, and ordered all further proceedings under the winding-up order to be stayed. The official manager appealed. On the hearing of the appeal, this contributory offered to pay back the money which the other five had paid on the compromise :—

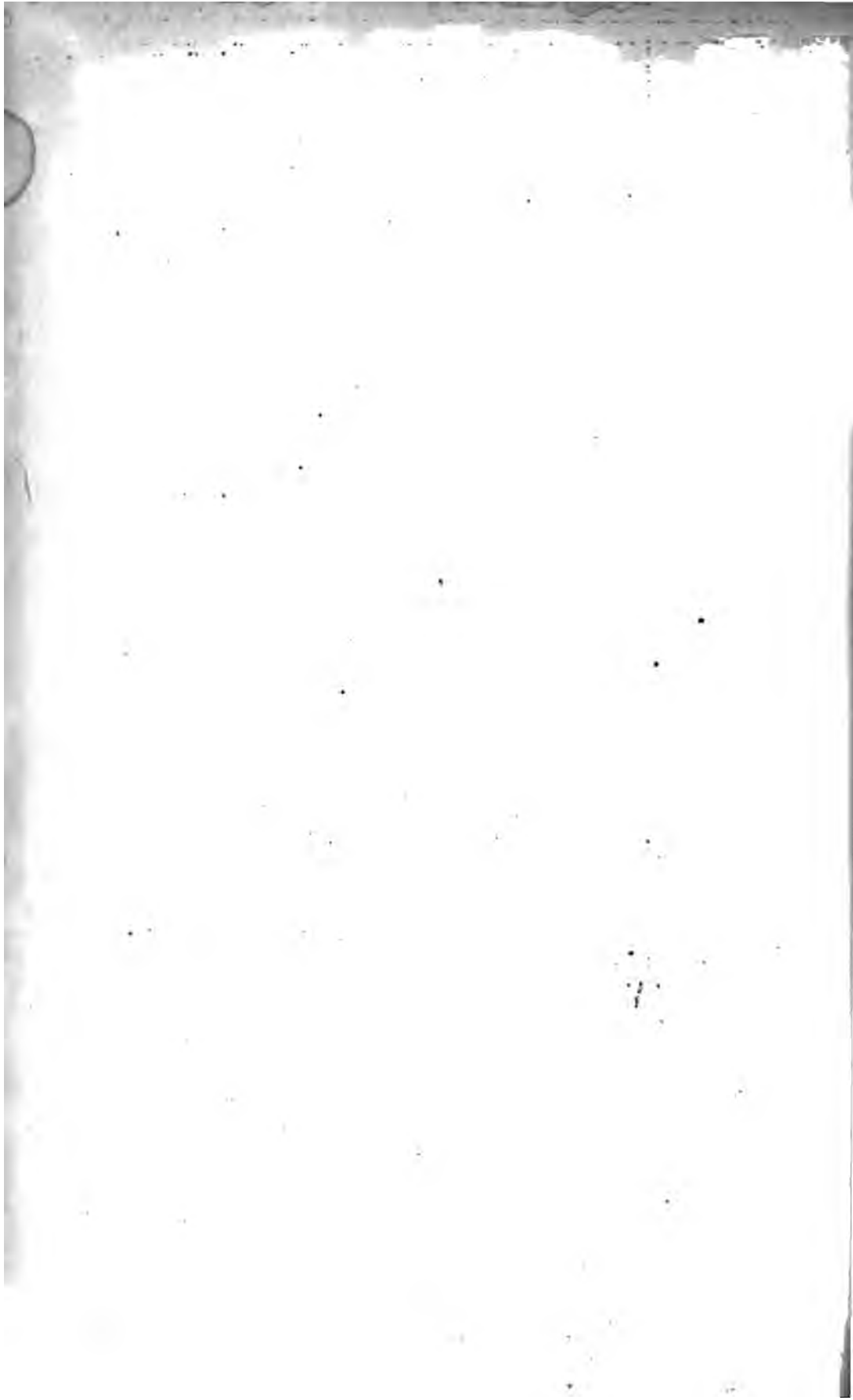
*Held*, that the court below had no jurisdiction to make the order to stay proceedings, it being a rule of the court that where necessary parties, being served, do not appear, the terms of the notice of motion cannot, so far as they are interested, be materially departed from; that, notwithstanding the dissent of the official manager to the compromise, and the offer of the party moving to repay the money the compromising contributories had paid, the compromise could be supported; and that the list of contributories was not such as the act of parliament required. *Underwood, Ex parte*, 391.

6. *Transfer of Shares.*] By the deed of settlement of a joint-stock company no shares could be transferred without the consent of the directors. The company being unprosperous, and serious disputes existing, some of the shareholders agreed to pay a sum to the directors in full discharge of all their liabilities, which money was accepted, and transfers were made to two persons, and the shareholders retired. The directors applied the money partly in payment of claims of the lessors (who were also directors) of the property held by the company, and partly in the payment of other claims, which were the subjects of the disputes. The company having been ordered to be wound up, the Master placed the name of one of the retiring shareholders on the list of contributories, and the Master of the Rolls refused to remove him; and, on appeal, the decision of the Master and of the Master of the Rolls was supported, the agreement being *ultra vires*, the directors having no authority thus to sanction the retirement of a body of the shareholders. *Bennett, Ex parte*, 572.









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